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Written and Unwritten Marriages in Hellenistic and Postclassical Roman Law

BY

HANS JULIUS WOLFF

DR. IUR.

PROFESSOR OF ROMAN AND CIVIL LAW AT
THE UNIVERSITY OF PANAMA

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FOREWORD

The present study was made in Panama, where no adequate public library was available to me. Only during a few weeks in the March–April, 1936, intermission, and (after completion of the manuscript) again in March–April, 1937, at the University of Michigan, did I have opportunity to gather material. This circumstance may, perhaps, excuse omission of any significant sources or studies.

After the printing had begun, I received, by the kindness of the author, E. Schönbauer's article entitled *Untersuchungen zum Publizitäts-Rechte im ptolemäischen und römischen Ägypten*, recently published in *Arch. f. Papyr.* XIII (1938), 39–60, a few references to which I was able to insert in the proofs. I am glad to state that some of Professor Schönbauer's views are in line with mine as given in this study.

My thanks are due to Mr. John O. Collins, Attorney at Law in Ancon, Canal Zone, to the editor of this series, Professor L. A. Post, and to Mrs. Frances Twomey in Ancon for a critical reading of the English manuscript. To Professors P. Koschaker, Berlin, and C. B. Welles of Yale University I owe a number of valuable suggestions. To those who have aided me in this study I express my most sincere appreciation.

H. J. W.

March, 1939

ADDENDA

To p. 2, note 4: Cf. *PSI.* VI 730 and *P. Mich. inv.* 508 + 2217 (see p. 99 f.). Another Latin dowry instrument in the Michigan collections will soon be published by H. A. Sanders.

To p. 28 note 96: ἢ σύ[νειμι] γυναικὶ κατὰ νόμους are the words of the testator in *P. Cair.* 10388.5 also (*edd.* Grenfell and Hunt, *Arch. f. Papyrol.* I 63 ff.; Gebelên, 123 B.C.).

To p. 69: Note, however, the scarcity of Ptolemaic Greek marriage contracts.

To p. 109, note on line 46: I owe the reading to H. Kortenbeutel who was kind enough to consult the original. To be sure, he writes me: " Allerdings ist nach ⌊ der Papyrus so dunkel, dass die Tinte nicht klar von dem Untergrund zu scheiden ist."

To p. 113, par. 1: In this connection, attention may be called to Partsch, *Demot. Bürgschaftsurk.* (see note 108), 587 ff.

CONTENTS

INTRODUCTION

It is common knowledge that the law of Justinian, in a number of cases, made the validity of a marriage dependent upon the drawing up of a written contract about dowry and nuptial gift. This was an exception to the general rule that the constitutive element in contracting marriage was exclusively the free consent of the parties,[1] a rule maintained, and several times positively asserted by the emperors, down to Justinian himself, as against differing opinions that were deeply rooted, it is evident, in the legal ideas of many nations of the empire.

The origin of this divergence from the general principle is an open question as yet. In the literature I find only the explanations that the controversy existing in the postclassical epoch was due to a contrast between western and eastern legal ideas, or between the conceptions of the Roman law, on the one hand, and native laws, on the other;[2] and one author, V. Arangio-Ruiz,[3] has added the statement that in Justinian the requirement of a written marriage contract, made for the purpose of getting unquestionable evidence of the existence of the *διάθεσις γαμική*, should be differentiated from the same requirement made by the Greek law which, in his opinion, treated the drawing up of the instrument as in itself sufficient and necessary to constitute a lawful marriage.

But with this the problem is not yet settled. We have to take into account the fact that marriage documents deal above all with property matters. The custom of drawing up

[1] See, e.g., W. Kunkel in Pauly-Wissowa, *s.v.* "Matrimonium" 2272; A. Ehrhardt in *Symbolae Friburgenses in honorem Ottonis Lenel* (Leipzig, Tauchnitz), 96 ff.

[2] L. Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs* (Leipzig, Teubner, 1891), 228; V. Arangio-Ruiz, *Persone e famiglia nel diritto dei papiri* (*Pubblicazioni della Univ. Cattolica, Scienze Giur.* XXVI, Milan, "Vita e Pensiero," 1930), 84; A. Ehrhardt, *op. cit.*

[3] *Op. cit.* 83 f.

a document with reference to the dowry was common in Rome also.[4] For what juridical reasons did provincial laws, in contrast with the Roman law, make legal recognition of the marriage dependent upon the drawing up of such an instrument, if and in so far as they did so? This question is connected with another. What nations had marriage laws based on this idea? In particular, did the Greek law of the Hellenistic time really set up this requirement, and thus establish a condition that was absolutely alien to the classic Greek marriage law? These questions must be answered before it will be possible to determine, on the one hand, the relation which existed between the postclassical imperial law and contemporary local laws, and on the other, to investigate the ideas and influences that caused the partial establishment by the latest legislation of the requirement of a written contract about dowry and nuptial gift as a prerequisite to any lawful marriage.

Research dealing with this subject has to start from the law of the papyri, which is dominated, at least in the Roman time, by the known antithesis of γάμος ἔγγραφος and γάμος ἄγραφος. This, however, involves the general problem of the establishment of the marriage relation in Greco-Egyptian law.

The papyrological problem is dominated by two main facts: double documentation of the same union, which is met with in the Enchoric law of the Ptolemaic period and in Alexandrian contracts of the time of Augustus, and the just mentioned coexistence of both written and unwritten marriages. A great deal of effort has been spent, in recent years especially, in order to explain these facts.[5] Up to a few years ago, authors,

[4] See, most recently, A. Ehrhardt in Pauly-Wissowa, *s.v.* "Nuptiae" (p. 4 of the reprint). See Addenda, page vi.

[5] See L. Mitteis, *Grundzüge der Papyruskunde* II (Leipzig, Teubner, 1912), 199 ff., where former opinions are discussed; F. Maroi, *Bull. dell' Ist. di Dir. Rom.* XXVIII (1916), 97 ff.; K. Sethe, *Göttinger Gelehrte Anzeigen* (1918), 377; P. M. Meyer, *Juristische Papyri* (Berlin, Weidmann, 1920), 40 ff.; L. Tripiccione, *L'actio rei uxoriae e l'actio ex stipulatu nella restituzione della dote secondo il diritto di Giustiniano* (Ancona, Bitelli, 1920), 33 ff.; U. Wilcken, *Urkunden der Ptolemäerzeit* (Leipzig, Teubner) I 322, 578 ff.,

differing as to particulars, more or less [6] agreed to the following extent: they assumed that in the Ptolemaic and Alexandrian law two types of union existed, the one being "looser" than the other. Only the form documented by the *συγγραφὴ συνοικισίου* may be considered, in their opinion, as a "full" marriage, the existence of the looser form being due to the fact that the Greeks took over a hypothetical Egyptian "alimentary" marriage.[7] But this theory, although backed by authorities like Mitteis, Wilcken, Partsch, and Wenger, is open to serious objections, as we shall see. Actually, since 1930, no fewer than four scholars, Arangio-Ruiz, Petropoulos, Bozza, and Schönbauer have attempted to replace it by other hypotheses, very different, however, from, and absolutely incompatible with, each other. There is a similar situation with regard to the *agraphos gamos*. Whereas formerly this was identified, more or less, with the "loose" marriage, nowadays scholars—especially since Wilcken [8] stated that it is not found in the sources before the Roman epoch—either are hesitant in

652; J. Partsch, *Juristische Urkunden der Ptolemäerzeit. P. Freib.* III (*Abh. Ak. Heidelberg* VII; Heidelberg, Winter, 1927), 15 ff.; U. Wilcken, *ibid.* 60 ff.; W. Kunkel, *Gnomon* IV (1928), 664 ff.; L. Wenger, *Aus Novellenindex und Papyruswörterbuch* (*Sitz.-Ber. Bayer. Ak.* 1928, IV; Munich, Beck, 1928), 66 ff.; V. Arangio-Ruiz, *op. cit.* (see note 2), 68 ff.; G. Petropoulos, *Τινὰ περὶ τοῦ γάμου ἐν Αἰγύπτῳ κατὰ τοὺς ἑλληνο-αἰγυπτιακοὺς παπύρους* (*Ac. of Athens* VI [1931], 115 ff.); St. G. Huwardas, *Beiträge zum griechischen und gräko-ägyptischen Eherecht der Ptolemäer und frühen Kaiserzeit* (*Leipziger Rechtswissenschaftliche Studien* LXIV; Leipzig, Weicher, 1931), cf. the reviews of M. San Nicolò, *Ztschr. Sav. St. Rom. Abt.* LIII (1933), 549 ff., and B. Kübler, *Philol. Wochenschr.* LV (1935), 528 ff.; Francesca Bozza, *Aegyptus* XIV (1934), 205 ff.; D. B. Bosdas (Μποσδᾶς), *Περὶ τοῦ γάμου. Συμβολὴ εἰς τὴν μελέτην τοῦ γάμου κατὰ τὴν Ἐκλογὴν τῶν Ἰσαύρων* (Athens, 1937), 31 ff. A brief history of the problem is given by Orsolina Montevecchi, *Aegyptus* XVI (1936), 7 ff., and, with more details, by E. Schönbauer, *Arch. f. Papyr.* XIII (1938), 42 ff.

[6] As to the Alexandrian *συγχωρήσεις*, W. Schubart, *Arch. f. Papyr.* V 74 ff., has another opinion.

[7] In a similar way Huwardas differentiates a "preliminary" marriage and a "full" marriage; as to the relation between his "preliminary" marriage and the "alimentary marriage" of the Egyptian law, he does not give an opinion.

[8] *UPZ.* (see note 5) I 580.

drawing conclusions with reference to it,[9] or identify it more or less with the Roman free marriage (Arangio-Ruiz, Petropoulos). Here too no agreement has been reached.

At present, agreement seems more remote than ever. It is impossible, in my opinion, to accept any of the theories hitherto suggested. Thus it appears worth while to undertake a new and minute study of the problem.

[9] See Wilcken, *UPZ.* I 580; Wenger, *op. cit.* (see note 5) 79; Huwardas, *op. cit.* (see note 5) 57.

SUMMARY

The first two chapters deal with the papyrological problem, along the lines marked out in the preceding introduction.

In the first section of the first chapter the conclusion is reached that under the Ptolemies there were not two types of marriage in the Chora, as the prevailing opinion holds, but two types of marriage contract, both of which brought about a perfectly lawful marriage. Those two types were, to reject divergent opinions of Arangio-Ruiz, Petropoulos, and Bozza: (1) the *συγγραφὴ συνοικισίου*, which was chiefly the instrument to attest that the bride had been given in marriage by *ἔκδοσις*; (2) the *συγγραφὴ ὁμολογίας*, which originally had been merely an acknowledgment by the husband of the receipt of a dowry, but had come to include, during the second century B.C. at the latest, provisions of the marriage itself, and so had come to be a real marriage contract which was followed by a *συγγραφὴ συνοικισίου* earlier in the Ptolemaic period, but eventually superseded the latter document. The juridical explanation of this evolution is found in the fact that the former custom of giving the daughter in marriage by *ekdosis* had been replaced by mere *de facto* joining; this is due to a weakening of the Greek family organization, and with it of the idea of domestic *potestas*, when these were no longer protected by a *polis* organization founded on them. Consequently the definitely Greek character of the Ptolemaic marriage law is vindicated.

In the second section it is pointed out that the problem of the dual form of marriage met with in Alexandria should be considered apart from that of Enchoric double documentation of marriages. In Alexandria both the marriage contracted through *συγχώρησις* and the marriage contracted before the *hierothytai* were entirely lawful as to private law, but only the latter form was acknowledged as lawful with regard to the civil and religious law of the city; it procured a better political status for the sons.

In the second chapter it is demonstrated that *ἀγράφως συνεῖναι*, attested by Dura Perg. 22 as a common Hellenistic custom, was not, as has been supposed by several scholars, a special type of marriage different from the marriage based on a written agreement. The only known peculiarities of the *agraphōs gamos* that are attested by *CPR.* 18 and *P. Oxy.* II 237 belong to Egyptian law,

but the Greek *ἀγράφως συνεῖναι* and the Egyptian *agraphos gamos* are combined in the institution that is met in Greco-Egyptian papyri of the Roman epoch. Juridically the Greek *ἀγράφως συνεῖναι* was not different from the Ptolemaic homologia marriage, except for the fact that no written agreement was executed. It did not imply adoption of the Roman free marriage, but was a natural outgrowth, within the Greek legal system, of the homologia marriage.

The third chapter links the Greek marriage law of Egypt with the classic Greek law. It is shown that probably the *συγγραφὴ συνοικισίου*—and, perhaps, by means of an analogy, also the *συγγραφὴ ὁμολογίας*, after it became a real marriage contract—was already effective before the couple actually joined. This is apparently due to the circumstance that in Egypt the two transactions that are required to constitute a lawful marriage under the Athenian law, that is, *ἐγγύησις* and *ἔκδοσις*, were combined in the one act of *ekdosis*, attested by the *συγγραφὴ συνοικισίου*, so that this document was equivalent to the Attic *engyesis*.

In the fourth chapter the conclusions reached in the foregoing chapters are applied to explain the requirement of a written contract as a condition of lawful marriage, which in some cases passed into law by the legislation of Justinian. It is shown that *de facto* union was practiced among the Greeks down to the Byzantine period, whereas the requirement of a written agreement, that is found in Oriental laws, was connected with the stipulation of a nuptial gift, which was an outgrowth of the primitive idea of purchase-marriage. So the Emperor's requirement, which merely aimed at unequivocal attestation of the marital intent, cannot be due to adoption of provincial legal ideas. It developed directly from ideas springing naturally from the latest classic Roman law under Christian influence.

In the Appendix, *P. Berol.* 16121, a *συγγραφὴ συνοικισίου* of cleruchs of the later Ptolemaic epoch is published and commented on. It contains several provisions not yet known from other sources.

CHAPTER I

DOUBLE DOCUMENTATION OF MARRIAGES

1. Enchoric Greek Law

As to the law of the Enchoric Greek population, the opinion of the coexistence of a "loose" or "preliminary" marriage and a "full" marriage is based—apart from influence of Egyptian customs, which is believed by some authors [10] to have been active—on the famous *P. Par.* 13 (Mitteis, *Chrestomathie der Papyruskunde* II [Leipzig, Teubner, 1912] no. 280; P. M. Meyer, *Jur. Pap.* no. 20; *UPZ.* 123) and on the contracts from Philadelphia, edited by J. Partsch and U. Wilcken as *P. Freib.* III 26, 29, and 30. *P. Par.* 13, as well as the Freiburg papyri, attests the drawing up of two written contracts concerning unions of the same people. According to those scholars who adhere to the double-marriage theory, it was only the second contract that definitely constituted the marriage, whereas the first merely created a union lower in legal quality, though also acknowledged as a marriage. In my opinion, the double-marriage theory is not tenable.

I. Omitting for the present the papyri of Freiburg, we can infer the legal structure of the Greek marriage in the Ptolemaic period from five marriage contracts: *P. Eleph.* 1 (Mitteis, *Chrest.* 283; Meyer, *Jur. Pap.* no. 18), a *συγγραφὴ συνοικισίας* of 311/10 B.C.; *P. Teb.* III 2, 974 of the early second century B.C.; *P. Giess.* 2 from Crocodilon Polis, 173 B.C.; *P. Arch. f. Papyr.* III 387 (composed by Wilcken of *P. Gen.* 21 and fragments from the Munich and Bodleian Libraries, which I shall refer

[10] Among more recent authors, above all Partsch and Wilcken suppose that "loose" and "full" marriage were an imitation of the Egyptian so-called "alimentary" and "full" marriages, see the quotations given in notes 108, 109; cf. also L. Wenger *op. cit.* 69 f., 70[6] and M. San Nicolò *Ztschr. Sav. St. Rom. Abt.* LIII (1933), 550.

to as *P. Gen.* 21; republished by Mitteis, *Chrest.* 284), a *συγγραφὴ συνοικισίου* of the second century B.C.; *P. Teb.* I 104, a *ὁμολογία γάμου* of 92 B.C. (Mitteis, *Chrest.* 285).[11]

We may neglect at first the earliest one of these texts because it definitely is a contract of Greek law,[12] and so constitutes a special case relative to the contracts just mentioned. But it is a strange fact that neither does any of the other four documents make any allusion to a second contract concerning the same union; and it is more than probable that there did not exist any other agreement in any of these cases. No evidence exists with regard to the question whether the instruments refer to "full" or to "loose" or "preliminary" marriages, and unanimity has not been attained about this problem. Partsch[13] and Wilcken[14] hold that *P. Teb.* I 104 is a document about a loose marriage, in view of the fact that it is drawn up in the form of *ὁμολογία*, which connects it with the *συγγραφὴ ὁμολογίας* of *P. Par.* 13. Kunkel[15] denies expressly that *P. Giess.* 2 is a full-marriage contract because of its private form, and accepts only *P. Gen.* 21; but we have to remember that he is skeptical about the whole theory.[16] Huwardas,[17] on the other hand, believes all the texts to be full-marriage contracts despite their formal differences. Huwardas, as a matter of fact, succeeded in proving the substantial uniformity of the marriages attested by these contracts.

P. Giess. 2, *P. Gen.* 21, and *P. Teb.* I 104, in particular, resemble each other very closely, in so far as they give rules about reciprocal rights and duties of husband and wife.

[11] *P. Berol.* 16121 (published in the appendix, p. 104 ff.), a *συγγραφὴ συνοικισίου* of the early part of the first century B.C., cannot be mentioned here, because the parts of the document which concerned the marriage itself are missing owing to mutilation. About *BGU.* VI 1283 and 1463 see below p. 21.

[12] Partsch *op. cit.* (see note 5) 15.

[13] *Op. cit.* 21, but see another opinion *op. cit.* 23.

[14] *P. Freib.* III p. 60.

[15] *Gnomon* IV (1928), 666 f.

[16] *Op. cit.* 668.

[17] *Op. cit.* (see note 5) 3 ff., 28 f.

P. Giess. 2, lines 15 ff.:

ἔστω [δὲ 'Ολ]υμπιὰς παρὰ 'Ανταίωι πειθαρχοῦσα αὐτοῦ ὡς π[ροσῆκόν ἐστιν γυναῖκα ἀ]νδρὶ κυριεύουσα μετ' αὐτοῦ κοινῆι τῶν ὑπα[ρχόντων, τὰ δὲ δέοντα καὶ τὰ ἔ]πιπλα καὶ τὸν ἱματισμὸν καὶ τἆλλα ὅσα προ[σήκει γυναικὶ γαμετῆι πα]ρεχέτω 'Ανταῖος 'Ολυμπιάδι ἐνδημῶν καὶ ἀπ[οδημῶν κατὰ δύναμιν τῶ]ν ὑπαρχόντων καὶ μὴ ἐξέστω αὐτῶι γυναῖκα ἄ[λλην ἐπεισάγεσθαι ἐπ' 'Ολυ]μπιάδα μηδὲ παλλακὴν μηδὲ παιδικὸν ἔχειν [μηδὲ τεκνοποιεῖσθαι ἐ]ξ ἄλλης γυναικὸς ζώσης 'Ολυμπιάδος μηδ' ἄλλ[ην οἰκίαν οἰκεῖν ἧς οὐ κυριεύ]σει 'Ολυμπιὰς μηδὲ ἐκβάλλειν μηδὲ ὑβρί[ζειν μηδὲ κακουχεῖν αὐτὴ]ν μηδὲ τῶν ὑπαρχόντων μηθὲν ἐξαλλο[τριοῦν ἐπ' ἀδικίαι τῆς 'Ολυμπιά]δος. ἐὰν δέ τι τούτων ἐπιδει[χθῆι] ποιῶν ἢ τὰ [ἔπιπλα ἢ τὸν ἱματισμὸν ἢ τ]ἆ[λλ]α μὴ παρέχηι αὐτῆι καθὰ [γέγραπται, ἀποτεισάτω 'Ανταῖος κτλ.

P. Gen. 21, lines 1 ff.:

...μη[...τ]ῶν ὑπαρχ[όντ]ων, [τ]ὰ [δὲ δέοντα πάντα καὶ τὸν ἱματισμὸν καὶ τἆλλα ὅσα προσήκει γυναικὶ γ]αμετῆι παρεχέτω Μενεκράτης 'Αρ[σ]ι-ν[ό]ηι [ἐνδημῶν καὶ] ἀπ[οδημῶν κατὰ δύναμιν τῶν ὑπαρχόντων αὐτοῖς καὶ] μὴ ἐξέστω Μενεκράτει γυναῖκ' ἄλλην ἐπεισάγεσθαι ἐπ' 'Αρσινόην μηδὲ παλ[λακ]ὴν μ[ηδὲ π]αιδ[ικὸν ἔχ]ειν μηδὲ τεκνοποιεῖσθαι ἐξ ἄλλης γυναικὸς ζώσης 'Αρσινόης μηδ' ἄλλην οἰκίαν οἰκ[εῖν ἧς ο]ὐ κυριεύ[σει] 'Αρσινόη μηδ' ἐκβάλλειν μηδὲ ὑβρίζειν μηδὲ κακουχεῖν αὐτὴν μηδὲ τῶν ὑπαρχόντων μηθὲν [ἀ]λλοτριοῦν ἄνευ τοῦ ἐπιγραφῆναι τὴν 'Αρσινόην βεβαιωτρίαν. ἐὰν δέ τι τούτων ἐπιδειχθῆι ποιῶν ἢ τὰ δέοντα ἢ τὸν ἱματισμὸν ἢ τἆλλα μὴ παρέχηι αὐτῶι[sic] καθὰ γέγραπται, ἀποτεισάτω Μενεκράτης 'Αρσινόηι παραχρῆμα τὴν φερνὴν ἡμιόλιον. κατὰ τὰ αὐτὰ δὲ μηδὲ 'Αρσινόηι ἐξέστω ἀπόκοιτον μηδὲ ἀφήμερον γίνεσθαι ἀπὸ τῆς Μενεκράτου οἰκίας ἄνευ τῆς Μενεκράτου γνώμης μηδ' ἄλλωι ἀνδρὶ συνεῖν[α]ι μηδὲ φθείρειν τὸν κοινὸν οἶκον μηδ' αἰ[σ]χύνειν Μενεκράτην ὅσα φέρει ἀνδρὶ αἰσχύνην. ἐὰν δὲ 'Α[ρ]σινόη ἑκοῦσα βούληται ἀπαλ-λάσσεσθαι ἀ[πὸ Μ]ενεκράτου, ἀ[π]οδοὺς αὐτῆι Μενεκράτης τὴν φερνὴν ἁπλῆν ἀφ' ἧς ἂν ἡμέρας ἀπαιτηθῆι [ἐν] ἡμέραις ξ' ἀποπεμψάτω αὐτήν.

P. Teb. I *104, lines 13 ff.:*

[ἔ]στω δὲ 'Απολλωνίαι[sic] π[α]ρὰ Φιλίσκωι πειθαρχοῦσα α[ὐ]τοῦ ὡς προσῆ[κό]ν ἐστιν γυναῖκα ἀνδρός, κυρ<ι>εύουσα{ν} μετ' αὐτοῦ κοινῇ

τῶν ὑπαρχόντων αὐτοῖς. τὰ δὲ [δ]έοντα π̣[ά]ντα καὶ τὸν ἱ[μα]τισμὸν καὶ τἆλλα ὅσα προσήκει γυναικὶ γαμετῆι παρεχέσθωι Φιλίσκος Ἀπολλωνίαν[sic] ἐνδημῶν καὶ ἀποδημῶν κατὰ δύναμιν τῶν ὑπαρχόντων αὐτοῖς, καὶ μὴ ἐξέστω Φιλίσκωι γυναῖκα ἄλλην ἐπ[ει]σ̣[ά]γεσθαι ἐ[πὶ] τὴν Ἀπολλωνίαν μηδὲ παλλακὴν μηδὲ π̣[αιδ]ικὸν ἔχειν μηδ[ὲ τεκνο]π̣οιεῖσθαι ἐξ ἄλλης γυναικὸς ζώσ[η]ς Ἀπ[ο]λλωνίας μηδ' ἄλλην [οἰκία]ν̣ οἰκεῖν ἧς οὐ κυριεύσει Ἀπολλωνίαι[sic] μηδ' ἐγβάλλειν μηδὲ ὑ̣β̣[ρίζ]ε[ι]ν μηδὲ κακουχεῖν αὐτὴν μηδὲ τῶν ὑπαρχόντων μηθὲν ἐξαλλοτ[ρ]ιοῦν ἐπ' ἀδικίαι τῆι Ἀπολλωνίαι. ἐὰν δέ τι τούτων ἀποδειχθῆι ποιῶν ἢ τὰ δέοντα ἢ τὸν ἱματισμὸν ἢ τἆλλα μὴ παρέχῃ αὐτῆι καθὰ γέγραπται, ἀποτεισάτω Φιλίσκος Ἀπολλωνίαι παραχρῆμα τὴν φερνὴν τὰ δύο τάλαντα καὶ τὰ[ς] τετρακισχιλίας δραχμὰς τοῦ χαλκοῦ. κατὰ τὰ αὐτὰ δὲ μηδὲ Ἀπολλωνίαι ἐξέστω ἀπόκοιτον μη[δὲ] ἀφήμερον γίνεσθαι ἀπὸ τῆς Φιλίσκου οἰκίας ἄνευ τῆς Φιλίσκου γνώ[μ]ης μηδ' ἄλλω[ι] ἀνδρ[ὶ] συνεῖναι μηδὲ φθε[ί]ρειν τὸν κοινὸν οἶκον μηδὲ αἰσχύνεσ̣θ̣[αι] Φιλίσκον ὅσα φέρει ἀνδρὶ αἰσχύνειν. ἐὰν δὲ Ἀπολλωνία ἑκοῦσα βο̣ύλ̣η̣[ται] ἀπαλλάσσεσθαι ἀπὸ Φιλίσκου, ἀποδότω αὐτῆι Φιλίσκος τὴν φερνὴν ἀ̣π̣[λῆν] ἐ[ν] ἡμέραις δέκα ἀφ' ἧς ἐὰ[ν ἀπ]αιτηθῆι.

The remains of *P. Teb.* III 2, 974 show that its editors have rightly completed it by following the pattern of these three contracts.

P. Eleph. 1 employs a different formula, but it does not differ from the contracts of the second and first centuries in its substantial provisions:[18] on the whole, we find the same duties of both husband and wife with reference to personal conduct, that is, support and fidelity on the part of the husband, loyalty on the part of the wife, whose duties are stated in more general terms.[19]

II. *P. Par.* 13 is a petition of about 157 B.C. of a certain Πτολεμαῖος Ἀμαδόκου Θρᾷξ, apparently addressed to the strategos of the Memphite county. The petitioner's mother, Asclepias, had been married to a certain Isidoros, who had promised her through a *συγγραφὴ ὁμολογίας*, along with other

[18] Differently Partsch *op. cit.* (see note 5) 17.

[19] Line 6: *εἰὰν δέ τι κακοτεχνοῦσα ἀλίσκηται ἐπὶ αἰσχύνηι τοῦ ἀνδρὸς Ἡρακλείδου Δημητρία.*

things, to make her a *συγγραφὴ συνοικισίου* within[20] a year; Asclepias, however, died *ἐν τῷ μεταξύ*, and some time later Isidoros also died. Ptolemaios, who succeeded to his mother's goods, attempts to retrieve her dowry from the possessors of Isidoros' inheritance. About the contract of Isidoros and Asclepias we read in lines 4 ff.:

Τῆς μητρός μου Ἀσκληπιάδος συνούσης Ἰσιδώρωι τινὶ τῶν ἐκ Πίτου, καθ' ἣν ἔθετο αὐτῇ συγγραφὴν ὁμολογίας, δι' ἧς διομολογεῖται ἄλλα τε καὶ ἔχειν παρ' αὐτῆς ἣν προσενήνεκτο φερνὴν χαλκοῦ (τάλαντα) β' καὶ περὶ τοῦ θήσεσθαι αὐτῆι ἐν ἐνιαυτῷ συνοικισίου,[21] *μέχρι δὲ τούτου συνεῖναι αὐτοῖς ὡς ἀνὴρ καὶ γυνή, κυριευούσης κοινῆι τῶν ὑπαρχόντων, ἐὰν δὲ μὴ ποιῆι καθότι γέγραπται, ἀποτίνειν αὐτὸν τὴν φερνὴν παραχρῆμα σὺν τῇ ἡμιολίαι.*

Very distinctly the text contrasts a *συγγραφὴ ὁμολογίας*, which had been set up when Isidoros and his wife started their joint life, with a *συγγραφὴ συνοικισίου* to be made to Asclepias by Isidoros at the latest one year after; and it is by reason of that deliberate contrast that we have to take the terms as being used in an exact technical sense. Therefore the understanding of our document depends upon a definition of both ideas.

1. *Συγγραφὴ συνοικισίου* was a common term to indicate a marriage contract in the Ptolemaic period,[22] and it was still used sometimes in the Roman epoch;[23] defenders of the doctrine of two

[20] I prefer this interpretation of *ἐν ἐνιαυτῷ* to that of "after one year" which is usually given; the latter ought to be in Greek: *μετ' ἐνιαυτόν*. Cf. Wenger, *op. cit.* (see note 5) 68 f. and Petropoulos, *op. cit.* (see note 5) 121.

[21] *Scil. συγγραφήν*; see Grenfell-Hunt, *P. Oxy.* II p. 245; Mitteis, *Grundzüge* 201[2] and *Chrest.* 280 on line 10; Wilcken, *UPZ.* I 582.

[22] *P. Eleph.* 1 (Mitteis, *Chrest.* 283; Meyer, *Jur. Pap.* no. 18; B.C. 311/10); *P. Teb.* III 1, 815 *fr.* 4 recto col. I 1 ff. (B.C. 228/1); *P. Sammelb.* III 7267 (Upper Egypt, B.C. 226); *P. Ent.* 91 (Magdola, B.C. 220); *P. Teb.* III 1, 822 (B.C. 179); *P. Par.* 13 (Mitteis, *Chrest.* 280; Meyer, *Jur. Pap.* no. 20; *UPZ.* I 123; Memphites, B.C. 157); *P. Teb.* III 1, 809 (B.C. 156); *P. Gen.* 21 (Mitteis, *Chrest.* 284; second century B.C.); *PSI.* II 166 (Thinites, B.C. 118); *P. Berol.* 16121 (see pp. 104 ff.; first century B.C.); *BGU.* VIII 1848 (Heracleopolites, B.C. 48/6).

[23] *BGU.* IV 1101 (Alexandria, Augustean time); *P. Oxy.* II 250 (A.D. 61);

types of Greek marriage in Egypt take it to be an expression properly applied to "full"-marriage documents.[24] As a matter of fact, *P. Eleph.* 1 terms itself *συγγραφὴ συνοικισίας*, while *P. Gen.* 21 and *P. Berol.* 16121 (see line 33) term themselves *συγγραφὴ συνοικι-(ϵ)σίου*; and other sources also provide evidence that it was precisely the *συγγραφὴ συνοικισίου* which gave to the couple in question the legal basis of their marital life.[25]

The classification of a written contract as a *συγγραφὴ συνοικισίου* does not depend on its form. The earliest one, *P. Eleph.* 1 (311/10 B.C.), is a private six-witness document, and the same is very probably true of *P. Gen.* 21,[26] although it is probable that at the time when the document was written (second century B.C.) public documentation was already usual. *P. Berol.* 16121 (early first century B.C.) also is a six-witness document, but it is at the same time a public homologia.[27] In Roman times we find marriage contracts drawn up before the *agoranomos* that are called *συγγραφαὶ συνοικισίου*.[28] In Alexandria the instrument attested before the

P. Oxy. II 266 (A.D. 96); *P. Amh.* II 71 (Hermopolites, A.D. 178/9). About *BGU.* III 717, which does not belong to this group, see note 29.—Doubtful *P. Vars.* 18 (time of Antoninus Pius), line 6: *συνο(ικισίας) διαγρα(φή)*.

[24] Wilcken, *Arch. f. Papyr.* I 487 f.; *UPZ.* I 579, 582; Meyer, *Jur. Pap.* p. 42; Partsch, *op. cit.* 21; Kunkel, *op. cit.* (see note 15) 666; Huwardas, *op. cit.* 10. Cf. also Mitteis, *Grundzüge* 213.

[25] *P. Ent.* 91.2 ff.: *τῆς γυναικὸς ἣι συνοικῶ κ[ατὰ συγγραφὴν συ]νοικισίου*; *BGU.* VI 1285.7: *ἣ[ι σύνειμι] κατὰ συνγραφὴν συνοικεσίου.* F. Bozza, *op. cit.* (see note 5) 235, overlooks these testimonials. Moreover, to her assertion that divorce contracts refer exclusively to the *συγγραφὴ γάμου* or *ὁμολογίας* can be directly opposed *P. Teb.* III 809.4 ff.: *ἐφ' ὧι συναρεῖταί μοι ἣν ἔχει ἡμῶν συνοικεσίου συγγραφήν*, and *PSI.* II 166.14 f.: *τὴν τοῦ συνοικεσίου [σ]υγγραφὴν ἐπιλυσάντων.*

[26] H. Kreller, *Erbrechtliche Untersuchungen auf Grund der graeco-ägyptischen Papyrusurkunden* (Leipzig, Teubner, 1919), 227, 238; Huwardas, *op. cit.* 4, in opposition to Kunkel, *op. cit.* 666. Evidently the original form of Greek marriage contract in Egypt was that of a six-witness document; cf. also *P. Giess.* 2 and Huwardas, *op. cit.* 5.

[27] Line 32 f.: *ἡ μὲν συνγρ[αφὴ ἥδε καὶ πάντα τὰ ἐν αὐτῆ] διωμολογημένα*; line 46: *Ἀμμώνιος ὁ παρὰ Ἡρακλείδου κεχρη(μάτικα).*

[28] *P. Oxy.* II 250.14 ff.: *διὰ [τῆς πρὸς τὴν] γυναῖκά μου—συνοικεσίου συνγραφῆς γεγονυία[ς διὰ τοῦ ἐν] Ὀξυρύγχων πόλει ἀγορανομίου*; *P. Oxy.* II 266.8 ff.: *δραχμὰς—ἃς προσηνέγκατο—ἐν φερνῆ—κα[τὰ συ]νγραφὴν συνοικισίου διὰ τοῦ ἐν Ὀξυρύγχων [πόλει ἀγορανο]μίου.* Cf. *P. Amh.* II 71.8 ff.: *κατὰ συνοικεσίου συνγρ(αφὴν) τὴν πρὸς τὸν ἄνδρα μου Νεοπτόλεμον Ἀρείου τετελειωμένην διὰ τῶν ἐπιτ[η]ρούντ(ων) ἀρχ(εῖον).* Uncertain *P. Princeton* II 31.8.

hierothytai could be given that name, see *BGU.* IV 1101.[29] On the other hand, on the verso of *P. Teb.* I 104 we read: Ἀπ[ολ]λωνίας [πρὸ]ς Φι[λ]ίσκον ὁμο(λογία) γάμου κεχ..[.....]..κοιν, but this papyrus also is a six-witness document; and, in view of the approximately contemporary *P. Berol.* 16121, the fact that *P. Teb.* I 104 had been registered by *anagraphe* (see line 42) cannot be the distinguishing element. Consequently it was neither the private nor the public form of the document which did, or did not, give it the character of a *συγγραφὴ συνοικισίου*, and we have to look for its essentials in the actual contents of the documents.

As to this examination, there are two possibilities to be excluded at once: Neither the constitution of a *φερνή* nor the arrangement of reciprocal rights and duties with regard to the marital life of the couple was the element that distinguished the *συγγραφὴ συνοικισίου* from other kinds of marriage instruments, since we have seen the one, as well as the others, occurring in *P. Teb.* 104 in the same manner as in texts which call themselves *συγγραφαὶ συνοικισίου*; a dowry was also given according to the *συγγραφὴ ὁμολογίας* of *P. Par.* 13. Nor is greater importance to be attributed to the question whether or not there is conceded to the wife a right to govern the common household together with her husband, so that any disposal of property is made dependent upon her consent (*Verfügungsgemeinschaft*).[30] Huwardas [31] believes indeed that this provision is the chief criterion of the "full" marriage and consequently a characteristic provision of the *συγγραφὴ συνοικισίου.* But actually it belongs no more to this sort of contract than to others. I do not insist on the fact that we meet with the *οἰκία-Klausel* (Huwardas) in *P. Teb.* I 104 and in *P. Freib.* III 30, since it might here appear to be a *petitio principii* to list these documents under the one or the other category. At any rate, evidence is provided by *P. Par.* 13 (*κυριευούσης κοινῆι τῶν ὑπαρχόντων*).[32]

But we must still exclude two other suggestions which have

[29] *BGU.* III 717.1 is restored by the editor: [*συνγραφῆς συνοικεσί*]*ου ἀντίγραφ*(*ον*) *ὑπόκειται.* But this *cheirographon* cannot belong to the same category, because it has been drafted as a *homologia* (cf. pp. 18 ff.). I propose to restore: [*χειρογράφου δεδημοσιωμέν*]*ου.*

[30] See Mitteis, *Grundzüge* 226 f.

[31] *Op. cit.* 6 ff., especially 9; B. Kübler, *Phil. Wochenschr.* LV (1935), 530.

[32] Huwardas, *op. cit.* 33, discusses with regard to *P. Par.* 13 and *P. Freib.* III 29 and 30, whether contractants had freedom in a "preliminary" marriage by special agreement, to assimilate the status of the wife to that of a "fully" married woman; but this would annul, in my opinion, his own former statements.

been proposed. In Partsch's [33] opinion the chief purpose of the *συγγραφὴ συνοικισίου* was to provide the wife with a right to keep her husband's property if he died not leaving children; Huwardas [34] believes that the main difference between the two forms, that is, "full" marriage, attested by the *συγγραφὴ συνοικισίου*,[35] and "preliminary" marriage, consists in the fact that the first or "full" form brings about joint property of the family, that is, goods bound in favor of the common children. We may neglect here the study of the property rights of husband, wife, and descendants that derived from marriage of Greeks in Ptolemaic Egypt.[36] For our purpose it is sufficient to state that arrangements like these were not essential to the kind of contract in question. It is true that rules of this kind occur in *P. Gen.* 21 [37] and probably in *P. Berol.* 16121, that is, in two documents expressly called *συγγραφαὶ συνοικισίου*, whereas they are missing in the *ὁμολογία γάμου* of *P. Teb.* I 104; and it is not unlikely that they were also stipulated in the lost part of *P. Giess.* 2, probably, as we shall see, also a *συγγραφὴ συνοικισίου*. At Alexandria it was likewise the *hierothytai* instruments in which arrangements with regard to the consequences of the death of either of the spouses could be included.[38] But these instances do not prove anything. In *P. Eleph.* 1 the provisions in question do not occur.[39] Indirect, but no less stringent counter-evidence is supplied by *P. Eleph.* 2 (Mitteis, *Chrest.* 311; Meyer, *Jur. Pap.* no. 23) and *BGU.* VI 1285. The first of these texts is a will drawn in B.C. 285/3 by Dionysios from Temnos in favor of his wife Callista from the same island, and of his three sons.[40] Above all, Dionysios disposes of his property in such a

[33] *Op. cit.* 18 f.

[34] *Op. cit.* 11, 16 f., 33. Cf. Kübler, *op. cit.* (see note 31).

[35] *Op. cit.* 10.

[36] Cf. the important objection made against Partsch by Bozza, *op. cit.* 230 f.

[37] Huwardas, *op. cit.* 16 ff.

[38] Considering their uncertain interpretation, I take no notice here of *P. Freib.* III, but if the exegesis to be made of them on pp. 21 ff. be right, they also substantiate our inferences drawn above.

[39] See also Bozza, *op. cit.* 230.

[40] Line 2: *τάδε διέθετο Διονύσιος Τημνίτης Καλλίσται Τημνίτει τῆι αὐτοῦ γυναικί.* Therefore, the common classification of the document as a marital contract about succession (Mitteis, *Grundzüge* 240, 242; introd. to *Chrest.* 311; Kreller, *op. cit.* [see note 26], 42 and *passim;* Meyer, *Jur. Pap.* p. 59; Huwardas, *op. cit.* 18; L. Wenger, *Studi in onore di S. Riccobono* [Palermo, Castiglia] I 546 f.) seems to me not entirely exact. At least the document is no contract made by and between the spouses. Actually the husband

manner that the entire estate will devolve upon the surviving spouse after the other's death,[41] and upon his or her demise will pass to the three sons in common. It follows that provisions pertaining to this case cannot have been made in the marriage contract, and thus the text confirms the conclusion drawn from *P. Eleph.* 1, since the marriage contract of Dionysios and Callista had been drafted beyond doubt according to the same scheme.[42] The contracts were almost contemporaneous—in 285/3 all three sons of Dionysios were already adult, as can be inferred from the fact that they sealed the paternal will—and the respective parties belonged to the same group of people in the same place. *BGU.* VI 1285, a will of a cleruch from the nome of Heracleopolis, insures the truth of our statement for the first century B.C.; the farmer distributes his estate among his sons and his wife ἦ[ι σύνειμι] *κατὰ συνγραφὴν συνοικεσίου.* It might well be that arrangements concerning demise of either husband or wife were frequent or even usual in *συγγραφαὶ συνοικισίου*, but as a matter of fact, they were not necessary, and cannot therefore be accepted as a characteristic to differentiate this type of marriage contract from other types.

In my opinion, the deciding element is the *ekdosis*, which seems to belong properly to the *συγγραφὴ συνοικισίου.*[43] There is no direct proof of this fact, to be sure, but indirect testimony, as well as general considerations, make it fairly probable. The context of

makes provision in the event of his wife's death. It is important that Dionysios speaks of *τὰ ὑπάρχοντα αὐτοῦ*, whereas *ὑπάρχοντα* of Callista are not mentioned, but it is merely provided for Dionysios *κύριον εἶναι τῶν ὑπαρχόντων*, should he survive (see the next note). Titular owner of all the property during the marriage is exclusively the husband, his position being limited only by the fact that all his dispositions depend upon his wife's consent. The latter circumstance, and perhaps also the fact that one of the sons was charged with duties even during his father's lifetime (see Mitteis and Wenger, *opp. citt.*), will explain the inscription: *συγγραφὴ καὶ ὁμολογία.* A special inquiry into these questions is reserved for another occasion.

[41] Lines 3 ff.: *ἐὰν δέ τι πάσχηι Διονύσιος, καταλείπειν τὰ ὑπάρχοντα αὐτοῦ Καλλίσται καὶ κυρίαν εἶναι τῶν ὑπαρχόντων πάντων μέχρι ἂν ζῆι. ἐὰν δέ τι πάσχηι Καλλίστα Διονυσίου ζῶντος, κύριον εἶναι Διονύσιον τῶν ὑπαρχόντων.* I think these words permit the inference that joint *κυριεύειν* by the couple was a *legal* consequence—since it probably was not stipulated in their marriage contract (see above in the text)—of the marriage. Another *legal* consequence seems to have been to bind the property in favor of the sons; cf. Huwardas, *op. cit.* 19.

[42] Cf. Huwardas, *op. cit.* 19.

[43] Cf. Bozza, *op. cit.* 216, but also 236.

P. Eleph. 1 begins: λαμβάνει Ἡρακλείδης—Δημητρίαν—γυναῖκα γνησίαν παρὰ τοῦ πατρὸς—καὶ τῆς μητρός, which represents the *ekdosis* as seen from the husband's side.[44] In *P. Teb.* III 815, fr. 4 recto, col. I 1 ff. a man acknowledges receipt of a φερνή from a woman for her daughter ἐφ' ᾧι ποήσειν συγγραφὰς συνοικεσίου (line 5); there is little doubt that the latter also was to be made by and between the man and the mother of the bride. In *P. Berol.* 16121 also, the father or guardian of the bride takes part in the contract. Furthermore, we read in *P. Oxy.* II 266, which is a dowry-restitution receipt issued by a woman to her former husband after divorce: ἃς προσηνέγκατο αὐτῷ ἐφ' ἑαυτῇ ἐν φερνῇ—κα[τὰ συ]νγραφὴν συνοικισίου.[45] Προσφέρεσθαι occurs as a term specifically used to denote the constitution of a φερνή in connection with an *ekdosis* in Ptolemaic, as well as Roman, contracts:[46] *P. Eleph.* 1: προσφερομένην εἱματισμὸν κτλ.; *P. Giess.* 2: ἐξέδοτο ἑαυτὴν Ὀλυ[μ]πιὰς—[εἶναι] γυναῖκα γαμετὴν φερνὴν π[ρ]οσφερομένην; cf. *BGU.* IV 1100: ἐπεὶ ἐγδέδονται—πρὸς βίου κοινωνίαν [ἀν]ὸρὶ καὶ προσενηνεγμένοι οἷα [ἐμ φ]ερνῇ;[47] *P. Oxy.* VI 905:

[44] Mitteis, *Grundzüge* 215; Partsch, *op. cit.* 15; Huwardas, *op. cit.* 5. Cf. also F. Bozza *Annali del Seminario Giuridico di Catania* I (1934), p. 5 of the reprint kindly sent me by the author.

[45] Cf. also *P. Amh.* II 71, though without technical formulation: τὰς προσενεχθείσας μοι ὑπὸ τοῦ πρὸς μητρός μου πάππου—κατὰ συνοικεσίου συνγρ(αφὴν) τὴν πρὸς τὸν ἄνδρα μου—τετελειωμένην—ἀρούρας.

[46] Cf. Bozza, *Aegyptus* XIV (1934), 233, whose assertion, however, that προσφέρεσθαι is applied whenever an *ekdosis* was in question is an exaggeration: *P. Oxy.* III 496: ἐξέδοτο—τὴν [ἐ]αυ[τοῦ] θυ[γ]ατέρ[α]—ἀ[πέχει δὲ ὁ γαμῶν (cf. also *P. Oxy.* III 497), and *BGU.* IV 1100: ἀπὸ τοῦ νῦν τὸ <ν> Ἀρτεμίδωρον ἀπεσχηκότα. Sometimes the word also was used without an *ekdosis* being in question, *P. Par.* 13: καθ' ἣν ἔθετο αὐτῇ συγγραφὴν ὁμολογίας, δι' ἧς διομολογεῖται—ἔχειν παρ' αὐτῆς ἣν προσενήνεκτο φερνήν, *CPR.* 22: ἔχω—καὶ προσ[ην]έχθηι μοι [παρὰ] τῆς μητρ[ός. But in the first of the two texts the important and emphasized expression is ἔχειν, in the second προσφέρειν refers to a special *prosphora* in addition to the *pherne*, as was frequent in the Roman epoch (see Huwardas, *op. cit.* 38[2]); similarly *P. Ryl.* II 155 and, as it appears, *P. Oslo* III 107.17.—Cf. also *P. Sammelb.* V 8010 (*Aegyptus* XVII [1937], 468 ff.), line 14; *BGU.* III 970 (Mitteis, *Chrest.* 242; Fayûm, A.D. 177), line 14; *P. Teb.* II 334 (A.D. 200/1), line 4 ff.: σ[υ]νῆλθον πρὸς γάμον Ἑρμῆ—καὶ προσήνεγκα ἅμα τῇ τοῦ γάμου [. . . . : . . . κατ]ὰ τὴν κιμ[έ]νην ἡμῖν συνγραφὴν φερ[νήν; *P. Oxy.* X 1274 (third century A.D.), line 15. *P. Lond.* II p. 207 (no. 178; A.D. 145) is not relevant to our question because the parties are Romans.

[47] *BGU.* IV 1100 is not a συγγραφὴ συνοικισίου, since it is a συγχώρησις which could not be called συγγραφή. See W. Kunkel in Pauly-Wissowa, *s.v.* "Συγγραφή" (p. 3 of the reprint).

ἡ δ' ἔκδοτ]ος φέρει τῷ ἀνδρὶ [εἰς φε]ρνήν; *P. Oxy.* X 1273: προσφέρει ἡ αὐτὴ ἐκδότις ἐπὶ τῇ αὐτῇ θυγατρὶ αὐτῆς καὶ γαμουμένῃ ἐν φερνῇ. Considering this coincidence in words, I believe it not to be unreasonable to hold that *P. Oxy.* II 266 refers to a similar contract, more especially since precisely in the nome of Oxyrhynchos the *ekdosis* was frequently used down to late times.[48, 49] (Cf. also *Dura Pap.* 74 [ed. C. B. Welles *Dura Report* VI 433 f.; A.D. 232]: παραδεδωκέναι[50] ἐαυ[τή]ν.)

Thus the συγγραφὴ συνοικισίου is that document which attested —at least in the Chora[51]—that a marriage was founded on the old and solemn Greek form of *ekdosis*.[52] This conclusion fully

[48] *P. Oxy.* II 372 descr. (A.D. 74/5); III 497 (early second century A.D.); 496 (Mitteis, *Chrest.* 287; A.D. 127); VI 905 (A.D. 170); X 1273 (A.D. 260); cf. *P. Oxy.* II 237 col. VIII 2 f. and *P. Oxy.* XVII 2133 (late third century A.D.): ἐν ὥρᾳ οὖν τοίνυν γενομένη γάμου ἐξεδόθην. See Grenfell-Hunt, introd. to *P. Oxy.* VI 905. *P. Oxy.* 496, 497, and 905 are *agoranomos* deeds (A. B. Schwarz, *Die öffentliche und private Urkunde im römischen Aegypten* [*Abhandl. Sächs. Ak.* XXXI 3, Leipzig, 1920], 305), thus corresponding very well to *P. Oxy.* II 266.—*P. Oxy.* II 265 is out of place here (in a different way Mitteis, *Grundzüge* 218[4] and Partsch, *op. cit.* 17[5]), because it is a *homologia* (see pp. 18 ff.). On the other hand, I think that *CPR.* 237 (Fayûm, second century A.D.) documented an *ekdosis*; see line 1: προσφέρη τῇ αὐτῇ σ[υγγ]ραφῇ πάνθ' ὅσα ἄ[ν . . . .

[49] Huwardas, *op. cit.* 18[1], 33 f. definitely differentiates the contracts of the Roman period from those of Ptolemaic times, because, as to the first category, he supposes that the contractants were Greco-Egyptians. In my opinion, however, we are entitled to mention them here. Primarily we do not know whether Huwardas' assumption is true, in view of the difficulty in identifying Greco-Egyptians (see Wilcken, *Grundzüge* 23, 61; W. Schubart, *Einführung in die Papyruskunde* [Berlin, Weidmann, 1918], 309). Moreover, "Greco-Egyptian" is a notion of mere racial relationship which has been created by modern scholars, and I strongly doubt the propriety of employing it with reference to legal questions, at least as far as private law is concerned; see p. 64. As a matter of fact, the contracts have been drawn up in Greek forms and Greek language, and are based on Greek ideas, and that justifies their utilization. Cf. Kreller, *op. cit.* (see note 26) 201 f. and Arangio-Ruiz, *op. cit.* (see note 2) 42 f.

[50] The same expression is used by *LXX Tob.* 7.12.

[51] As to Alexandria, see pp. 34 ff.

[52] Therefore I believe that *P. Giess.* 2 also is a συγγραφὴ συνοικισίου, cf. Bozza, *op. cit.* 205. To *BGU.* VI 1283.6 I should prefer a supplement as follows: συνγρα[φὴ ὁμολογίας περὶ συμβι]ώσεως. The restoration: συνγρα[φὴ συνοικισίου . . . . .]ε.εως, assumed by the editor, Schubart, and by Kunkel, *Gnomon* IV (1928), 667, and asserted by Bozza, *op. cit.* 210, seems to be unlikely, considering that the context starts, without speaking of an

corresponds with the traditional meaning of *συνοικεῖν*; even in old Greece it was a *terminus technicus* to denote lawful joint marital life, and that regularly meant a marriage which had been contracted through an *ekdosis* of the bride, whereby she was given to the husband by her father or *κύριος*.[53]

Whether or not *ἐκδίδοσθαι* when used by Egyptian Greeks still reflected a living custom and a real idea, or had degenerated to a mere phrase, does not matter here; we will deal with this question later. It is clear, at any rate, that the *συγγραφὴ συνοικισίου* was still for a long time connected with the idea of a marriage constituted solemnly and sincerely. We see the reason why down to the first century B.C. people belonging to conservative Greek social groups, like that of the *κάτοικοι*, drew up a *συγγραφὴ συνοικισίου* (*P. Berol.* 16121) or emphasized the fact that they lived together with their wives on that basis (*BGU.* VI 1285).

2. To get an idea of the relation which existed between the two contracts mentioned in *P. Par.* 13, we have chiefly to consider *P. Teb.* III 815, fr. 4 recto, col. I 1 ff. The text is an abstract embodied in a register of contracts (from 228 to 221 B.C.) of an agreement made by a man with the mother of his bride (lines 2 ff.): *διομολογεῖ Πτολεμαῖος Στεφάνου Σαλαμείνιος τῆς ἐπιγονῆς ἔχειν παρὰ Θευτείμης τῆς Ἡρακλείδου Κυρην<α>ίας—φερνὴν τῆς αὐτῆς θυ(γατρὸς) Θευξένας—ἐφ' ᾧ ποήσειν συγγραφὰς συνοικεσίου, ἐὰν δὲ*[54] *.....πατρὸς αὐτῆς Ἡρακλεί[δου].....ηι Θευτείμη ἢ Θευξένα τὴν [φερνὴν, ἀποδότω?] παραδεχόμενος αὐτῶι τὰ ἀναλώματα πάντα κτλ.—συγγραφοφύλαξ Ἀγήνωρ Σισσίνου.*

Apparently we face here[55] an arrangement very similar to that of Asclepias and Isidoros referred to in *P. Par.* 13; coincidence

ekdosis, with a homologia by the husband about receiving the dowry. W. Schubart was kind enough to reëxamine the original; he could not confirm my suggestion, but since only *ως* can be deciphered without doubt, neither does he assert its impossibility.—As to *BGU.* IV 1045.1 I also should prefer: *ἀντίγραφον συν[γραφῆς]*; cf. *P. Ryl.* II 154 and *CPR.* 28. As to *BGU.* III 717 see note 29.

[53] See Huwardas, *op. cit.* 12. But I think, against his opinion, that in the instances given by him in note 1 the word is applied in its precise technical meaning. Furthermore, cf. Isaeus 3.64: *τὰς μὲν ἐκδοθείσας ὑπὸ τῶν πατέρων καὶ συνοικούσας γυναῖκας.* Cf. also V. Magnien, *Mél. Desrousseaux* (Paris, Hachette, 1937), 298.

[54] Editors interpret this passage: ". . . if (with the concurrence?) of her father Heracleides Theutime or Theuxena (demand back?) the dowry, he shall repay. . . ."

[55] Another instance of the same type of contract is apparently *P. Teb.* III 822 (B.C. 179).

extends even to words, cf. *διομολογεῖται* in *P. Par.* 13, line 7. Nevertheless, important differences between our text and the *συγγραφὴ ὁμολογίας* of *P. Par.* 13 must not be disregarded. We may set aside for the moment the fact that in *P. Par.* 13 it is the bride herself who contracts with her future husband. The most remarkable divergence is found in the contents of the documents. The homologia of *P. Teb.* III 815 deals only with the dowry; it is apparently an act preliminary to the marriage itself; and the initiation of the actual marital life of Ptolemaios and Theuxena is postponed to the time when the *συγγραφαὶ συνοικεσίου* has been drawn up. According to *P. Par.* 13, on the other hand, the couple started their real union at once, since they agreed upon the *κυριεύειν κοινῇ τῶν ὑπαρχόντων*. In *P. Par.* 13 the man pledges himself to make the *συγγραφὴ συνοικισίου* within a twelvemonth, whereas in *P. Teb.* III 815 neither the obligation to draw up this contract nor a fixed time for doing so was stipulated.

A third instance of the same series of documents is *P. Teb.* I 104, two generations later than *P. Par.* 13. It conforms somewhat to *P. Teb.* III 815 with regard to form; it is also a registered [56] *syngraphophylax* document, attesting a homologia.[57] In content it is very close to *P. Par.* 13, but it differs very distinctly from both *P. Teb.* III 815 and *P. Par.* 13, since it makes no mention of a *συγγραφὴ συνοικισίου*; the homologia is sufficient in itself to prove the marriage, a marriage which, as we have seen, does not differ substantially from those attested by *συγγραφαὶ συνοικισίου*.

I think that our documents, each separated from the other by a space of 60 or 70 years, show three steps of a gradual evolution. Originally the marriage contract, properly speaking, of Egyptian Greeks was the *συγγραφὴ συνοικισίου*. The homologia concerned the dowry. Agreements about the marriage relation itself were not essential to it, as is evident from *P. Teb.* III 815. But they could be inserted when actual marital life started at once; that was

[56] On the basis of his assumption (*UPZ.* I 614 ff.) that the *public* *γραφεῖον* did not exist until B.C. 146, Wilcken, *Arch. f. Papyr.* XI 151, considers the *γραφεῖον* of *P. Teb.* III 815 as a private writing office. But he believes that it is this kind of office that was transformed into the public *γραφεῖον*, *ibid.* 302.

[57] The same I believe to be probable of *P. Par.* 13 because of the expression: *συγγραφὴ ὁμολογίας*. *Συγγραφή* originally means precisely the six-witness document, see Kunkel in Pauly-Wissowa, *s.v.* "Συγγραφή" (p. 1 of the reprint).—Cf. also *P. Lips.* 27 (Mitteis, *Chrest.* 293; Tebtunis, A.D. 123), lines 15 ff.: *τὴν πρὸς ἀλλήλους [συν]βίωσιν ἥτις αὐτοῖς συνεστήκι ἀπὸ συνγραφῆς ὁμολ(ογίας) γάμου τε[λει]ωθῖ[σ]αν διὰ τοῦ αὐτοῦ γραφίου*. A contract of the same kind is *P. Oxy.* II 265 (time of Domitian). For this see note 48.

done in the cases of *P. Par.* 13 and *P. Teb.* I 104, as well as of *P. Oxy.* II 265 and *P. Lips.* 27.[58] In very distinct contrast with the homologia document, the main purpose of the *συγγραφὴ συνοικισίου* was to attest that a marriage had been contracted by an *ekdosis*. Formal acknowledgment by the husband that he has received a *pherne* is regularly lacking, just as in the homologia there is no proper statement that the marriage had been constituted, even in case joint life was to begin immediately; and, whereas in the homologia rules about rights and duties of the couple are rather extraneous and are only stipulated in connection with particulars about the dowry, in the *συγγραφὴ συνοικισίου* the chief consideration is the ordering of the marriage itself, and provisions about the dowry are supplementary.[59]

In its essence the *συγγραφὴ συνοικισίου* is a document about the marriage, the *συγγραφὴ ὁμολογίας* one about the dowry.[60, 61] But in the course of time the latter came to be regarded as sufficient for attesting the marriage itself, in case marital life had started when the homologia was drawn up. This state of evolution is clearly indicated by *P. Teb.* I 104, whereas in the case of *P. Par.* 13 a special *συγγραφὴ συνοικισίου* was still held necessary; the reasons for this circumstance will be discussed later (see page 26 f.).

[58] See the foregoing note.

[59] Similarly, to some extent, L. Tripiccione, *op. cit.* (see note 5) 16 f.

[60] This is disregarded by F. Bozza, *op. cit.* 212 and *passim*. The expression: *ὁμολογία γάμου*, always used by Bozza (in the same way Petropoulos, *op. cit.* 120), occurs in two instances only, that is, *P. Teb.* I 104 (nevertheless Bozza holds this text to be a *συγγραφὴ συνοικισίου*, *op. cit.* 205) and *P. Lips.* 27; and in both cases the homologia document, as the only one drawn up about the marriage, attests simultaneously the beginning of joint life.

[61] Another piece of evidence is *P. Freib.* III 29a (*ed.* Wilcken, *P. Freib.* III p. 66). Calling the text a divorce would be incorrect; really it is but an acknowledgment, given by Alexandra to her former husband, that she had received back her *pherne* (cf. Wilcken, *op. cit.* 67). The dowry had been constituted [—*κατὰ συγγρα*]*φὴν ὁμ*[*ολογί*]*ας* (line 17). On the other hand, *P. Teb.* III 809.5 f. (B.C. 156) *ἣν ἔχει* (*scil.* the wife) *ἡμῶν συνοικεσίου συγγραφήν*, is best understandable from our idea of the nature of the *συγγραφὴ συνοικισίου*. If I am right, the text is a petition (see the oath at the end; cf. W. Kunkel, *Ztschr. Sav. St. Rom. Abt.* LI [1931], 236 ff., 245, but also Seidl, *Der Eid im römisch-ägyptischen Provinzialrecht* [*Münchner Beiträge zur Papyrusforschung und antiken Rechtsgeschichte* XVII, Munich, Beck, 1933], 5) of a husband who wants to divorce his wife, or who has already done so, and offers to pay back the dowry (cf. the editor's note on line 2) in order to effect annulment of the marriage instrument.

It is unknown when the custom of inserting marriage provisions in the dowry homologia came into existence. The blessing *ἀγαθῇ τύχῃ*,[62] as well as the probable [63] inscription *συνγρα[φὴ ὁμολογίας περὶ συμβι]ώσεως*, makes it appear likely that *BGU.* VI 1283 (Oxyrhynchites, 216/5 B.C.) was already such a contract.[64] Since the lower part of this papyrus is lost owing to mutilation, it cannot be said whether or not it also contained an agreement to make a *συγγραφὴ συνοικισίου*.[65] No inferences can be drawn from *BGU.* VI 1463 (Elephantine, 247/6 B.C.). The ostrakon contains but a draft for a marriage contract.[66] Its terms were formulated rather in the manner of *συγγραφαὶ συνοικισίου* (cf. lines 5 f.: *εἰσοίσειν αὐτῶι πάντα τὰ ἴδια ὅσα ὑπάρχε[ι Φιλω]τέραι*; line 9: *ἔξειν σε γυναῖκα*), and I believe that the planned contract was to be of that category; *ὁμολογεῖ* might have been written by mistake, as the whole text shows that the drafter was not skilled in composing documents.[67]

3. The next texts to be considered are *P. Freib.* III 26, 29, 30 (Philadelphia, 179/8 B.C.).[68] Although in an extremely bad state of preservation, they have been ingeniously edited and restored by Partsch and Wilcken.

They represent a special type of marriage contract, different in some ways from the documents we have considered hitherto. After some introductory clauses, to which we shall give attention later, there follow stipulations already known to us from other contracts—the special clauses in favor of the bride's mother [69] may be neglected here—and drafted, as is evident, in almost the same terms, but arranged in a different manner. First stand clauses dealing with the contingency of death of either husband or

[62] Cf. *P. Giess.* 2; *P. Oxy.* III 496; X 1273; *Dura Pap.* 74 (*Dura Report* VI 433 f.).

[63] See above note 52.

[64] Cf. Huwardas, *op. cit.* 29[2].

[65] According to the classification of the document as a *syngraphe*, I hold it to be possible that it was drawn up in the form of a *syngraphophylax* deed like *P. Teb.* III 815 and I 104.

[66] Editor, E. Kühn; Huwardas, *op. cit.* 29[2].

[67] Yet we have to reckon with a special form to be given to the definite contract, since the woman herself is contracting; the use of *ὁμολογεῖν* might be due to that circumstance. A regular *συγγραφὴ συνοικισίου* ought to have the form of a self-*ekdosis* like *P. Giess.* 2, and it is doubtful whether we have a right to assume the existence of that type as early as the third century.

[68] Further instances seem to have been *P.* 17 and 31; Wilcken, *op. cit.* 53, 69.

[69] Partsch, *op. cit.* 25, on line 32.

wife, very similar to those we meet at the end of *P. Gen.* 21, in so far as that papyrus is preserved. Next come in *P.* 30—corresponding parts of *P.* 26 and 29 have been lost—the wife's duties and her right to a divorce at any time, and last of all the husband's duties are stipulated. Provisions for disposition of the dowry occur in each section.

The problem of this group of sources lies in the fact that the husband regularly pledges himself [70] to make with his wife a second contract *ἐπὶ τῶν πραγματευομένων τὰς γαμικὰς συγγραφάς* within thirty business days after he has been requested by her to do so. In what relation would the second act have been to the first?

As in *BGU.* IV 1050, the contents of the second document are sketched in the prospectus. The only thing we can claim certainly for it, however, is some mention of the dowry; *P.* 30.3: *συγγραφόμ]ενος τὴν φε[ρνήν* (cf. *P.* 29.11). Some scholars go much further. Partsch [71] and Huwardas [72] believe that there were outlined to be inserted in the promised contract all the dispositions to ensue upon the decease of either party, and Wilcken [73] and Bozza [74] would understand in this sense all that follows the *θέσθω* clause. I cannot agree with either the one or the other opinion. As to the lower part of *P.* 30, line 19: *γε]νέσθω Εἰρήνη* makes it evident that the provision is effective at once. I think the same is true of lines 6–16. What remains does not support Partsch's interpretation, and such a detailed summary of arrangements to be made through a contract to be drawn up only in the future is not very likely in itself.[75] Moreover, there is actual evidence on the other side, since the two suppositions on which Partsch based his theory are untrue. On the one hand, owing to Wilcken's [76] correction of what Partsch had deciphered in *P.* 30.28, it can be asserted that there is really no repetition of any provisions previously stipulated. Yet more important, and even decisive, is the following circumstance: the mention, made in *P.* 26 and 29, of some

[70] Wilcken, *op. cit.* 65.

[71] *Op. cit.* 18; in a different way with reference to *P.* 29—in connection, if I understand him, with his understanding of the mention of the *demosion* of Crocodilon Polis.

[72] *Op. cit.* 26.

[73] *Op. cit.* 69, to *P.* 30.28.

[74] *Op. cit.* 219.

[75] Cf. W. Kunkel, *Gnomon* IV (1928), 667[1]. See the characteristic conciseness of *BGU.* IV 1050.27 ff.—Arangio-Ruiz, *op. cit.* (see note 2) 69 f. seems to assume the same content in the case of both instruments.

[76] *Op. cit.* 69.

deposition to be made in the *δημόσιον* [77] of Crocodilon Polis, can only refer to the first contract,[78] because it is before the *θέσθω* clause. In *P.* 30 the deposition is stipulated *after* the clauses in question; consequently they cannot be a mere anticipation either.[79]

Thus the Freiburg papyri also attest marriages with full effect, although a later contract is provided for. This, I believe with Partsch and the other interpreters, must have been the *συν[οικεσίου συγγραφή* mentioned in *P.* 30.36, according to Partsch's probable restoration. It is true that this suggestion has its difficulties, considering the fact that the second instrument was to be drawn up *ἐπὶ τῶν πραγματευομένων τὰς γαμικὰς συγγραφάς.* This board is not known to us from other sources; all the other *συγγραφαὶ συνοικισίου* that we possess from earlier times are six-witness documents.[80] But the expression *γαμικαὶ συγγραφαί* makes it likely that the contract concerned the marriage, and, as in *P. Par.* 13, a special right to demand its drawing up was granted to the wife.

If this be true, the arrangements from Philadelphia are very close to that of *P. Par.* 13.[81] Our documents are *συγγραφαὶ ὁμολογίας.* The circumstance, proved by *P. Teb.* III 815, that even *syngraphophylax* documents could be embodied in registers, conforms with and supports Partsch's suggestion that the Freiburg contracts belong to the same category.[82] Furthermore, the unusual arrangement of matter in *P. Freiburg* III 30 now becomes understandable; the chief purpose of the document is to regulate relations between the couple with reference to the dowry, and all the special rules are given in close connection with this dominating point of view. Thus the marriage *homologiai* of Philadelphia are in perfect agreement with our former statements about the nature of the homologia.

III. Our analysis leads to the following conclusions. There were two kinds of contract concerning marriage among En-

[77] About its nature see Wilcken, *op. cit.* 64 f.

[78] In the same way Wilcken, *op. cit.* 63.

[79] In consequence of that I should prefer the following restoration: *ἔστω δὲ ἡ προγεγραμμένη Εἰρήνη παρὰ Μένωνι* to Partsch's supplement at *P.* 30.17: *μέχρι δὲ τούτου ἔστω Εἰρήνη παρὰ Μένωνι.*

[80] *P. Berol.* 16121, from the beginning of the first century B.C., is both a six-witness document and an *agoranomos* deed. A *syngraphophylax* is not mentioned.

[81] Cf. Partsch, *op. cit.* 19.

[82] *Op. cit.* 5; doubted by Wilcken, *ibid.* 51 f. Cf. Kunkel in Pauly-Wissowa, *s.v.* "*Συγγραφή*" (p. 2 of the reprint). I agree with Wilcken, in so far as he wants *ὁμολογεῖν.* Cf. note 86.

choric Greeks, *συγγραφὴ ὁμολογίας* and *συγγραφὴ συνοικισίου*, but both of them attested a completely lawful marriage. A "loose" or "preliminary" marriage in contrast with a "full" marriage did not really exist.[82a] The *συγγραφὴ ὁμολογίας* originally was just a dowry agreement, but stipulations about the marriage itself could be inserted, and eventually it was no longer considered necessary to draw up a special *συγγραφὴ συνοικισίου* in addition to the agreement.

It need not be specially pointed out that our statements also exclude Francesca Bozza's [83] assertion that the *ὁμολογία γάμου* [84] was a solemn and necessary [85] contract of Enchoric Greeks which contained an *engyesis* together with the constitution of the dowry, whereas the *συγγραφὴ συνοικισίου* only attested the actual beginning of the matrimony by joint life, and was—in contrast to the homologia—not a legal condition of lawful marriage.[86] They are also incompatible with the

[82a] In the same way E. Schönbauer, *op. cit.* (note 5) 56 f.

[83] *Op. cit.* 205 ff., especially 217 ff. (fully approved by O. Montevecchi, *Aegyptus* XVI [1936], 13; see also H. Kreller, *Ztschr. Sav. St. Rom. Abt.* LV [1935], 480: *wahrscheinlich*, furthermore R. Taubenschlag in *Atti del IV Congresso Internazionale di Papirologia* (Milan, Vita e Pensiero, 1936), 268). Formerly in the same way U. Wilcken, *UPZ.* I 322 (followed by P. M. Meyer, *Ztschr. Sav. St. Rom. Abt.* XLVI [1926], 320), but withdrawn, *ibid.* 652 f. (Wilcken refers to *P. UPZ.* 66.) Cf. also Partsch, *op. cit.* 23.

[84] Bozza holds that only *P. Freib.* III and the homologia of *P. Par.* 13 are *ὁμολογίαι γάμου*, but not *P. Teb.* I 104, which is really the only Ptolemaic text which calls itself that.

[85] *Op. cit.* 228.

[86] I cannot find any trace of the old Greek marriage *engyesis* in the papyri (cf. Wilcken, *UPZ.* I 653). The only evidence which Bozza (*op. cit.* 213) claims to have found in the sources, *P. Ent.* 23, fails to prove her point. She relies here chiefly upon *εγγ*[on the verso, line 3. This, however, means apparently a guarantee to secure the restitution of the dowry; the dowry is mentioned first (*περὶ φερνῆς καὶ ἐγγ*[), whereas reference to the marriage *engyesis* would logically require the reverse order. Moreover, the text itself, despite its poor preservation, excludes Bozza's interpretation, since lines 5/6 make it evident that there existed already a joint life of the plaintiff with her husband: *τὰ προσή]κοντα οὐ παρέχει ἐκκλείει τέ με ἐκ*[. Consequently, I should prefer the following supplement: *συγγραψα*[*μένου*] *γὰρ αὐτοῦ μοι ἔχ*[*οντα τὴν προσενεχθεῖσαν ἐπ' ἐμοὶ φερνὴν κατὰ τὸν νόμον τὸν π*]*ολιτικόν τῶν* [*Ἰου*]*δαίων ἔχειν με γυν*[*αῖκα* to Bozza's restoration of line 2,

hypothesis of Arangio-Ruiz [87] who compares the two instruments in the case of marriage to the two documents in the case of sales, that were necessary for official validation of the transfer of title; [88] he considers that there were similar reasons with reference to the dowry and to reserved rights of the descendants in real property. But as we have seen, both homologia and *syngraphe* had their own functions and their special subject matter.[89]

The evolution assumed here is due, in my opinion, to the general character of the Greek family law in Egypt. The first immigrants brought with them elements of their national family organization. This affected in particular the institution of marriage, inasmuch as the woman was given away through *ekdosis* by her father, or—in a remarkable modification of the laws of the mother country [90]—by her parents (*P. Eleph.* 1) or even mother (for example, *P. Petr.* III 19c). To that order of facts corresponded the *συγγραφὴ συνοικισίου*

which reads as follows:—ἐγ[*γύησιν καὶ φερνὴν* (or ἐγ[*γυήσεως καὶ φερνῆς ὁμολογίαν*) *ὡμολόγησε πρὸς τὸ π*]*ο*̣*λ*̣*ιτικόν.*

Bozza's proposal (*op. cit.* 227) to read *P. Freib.* III 29.6: [*ἔξειν γυναῖκα γαμετὴν ἐγγυητὴν παρὰ*] *τ*̣[*ο*]*ῦ αὐτῆς ἀδελφοῦ* is impossible. Such a power of the brother is unknown in the papyri. Isidora must have contracted personally, her brother being her *κύριος*. We must suppose the context to have been similar to *P. Teb.* I 104.—Petropoulos, *op. cit.* (see note 5) identifies incorrectly *engyesis* with *ekdosis* (but see p. 79).

[87] *Op. cit.* (see note 2) 70 f. His theory had already been hinted at by Kunkel, *Gnomon* IV (1928), 668. It refers to the Alexandrian contracts also.

[88] V. Arangio-Ruiz, *Lineamenti del sistema contrattuale nel diritto dei papiri* (*Pubbl. della Univ. Catt. del Sacro Cuore, Scienze Giuridiche* XVIII, Milan, "Vita e Pensiero," 1928), 25 ff.

[89] Petropoulos, *op. cit.* 118 ff.; Huwardas, *op. cit.* 28 (approved by M. San Nicolò, *Ztschr. Sav. St. Rom. Abt.* LIII [1933], 550); Bozza, *op. cit.* 232 with whose positive statements I do not agree, however; now also Schönbauer, *op. cit.* (note 5) 56. For good reasons Petropoulos, *op. cit.* 123, and Bozza, *op. cit.* 233, emphasize the fact that contractants could omit the second contract.—In conflict with Arangio-Ruiz, *Persone e famiglia* 71, I do not think that fiscal interests were important here. There is no indication at all in the papyri that there was a tax on marriage contracts or dowry agreements.

[90] Cf. R. Taubenschlag, *Ztschr. Sav. St. Rom. Abt.* XLIX (1929), 120 f.; Arangio-Ruiz, *Persone e famiglia* 46 ff.

as the document which attested *ekdosis*. So, in a country where it was common to give written form to legal transactions, it is easy to understand why this was for a long time considered to be the instrument required to attest a solemn contraction of lawful marriage; arrangements like those of *P. Teb.* III 815, *P. Freib.* III 26, 29, and 30, and *P. Par.* 13, and the importance still attributed to the "*syngraphe* about joint life" by conservative people in the first century B.C. give evidence of that.[90a] To secure the wife's, and her parents', rights in the dowry a homologia *syngraphe* might be drawn up, though this was probably unnecessary.

The opposite tendency, however, presently set in. It became usual to start marital life before a *συγγραφὴ συνοικισίου* had been drawn up, and to insert rules about the marriage itself in the homologia. Moreover, the strict organization of the patriarchal family could not be maintained. Women began to give themselves in marriage: *BGU.* VI 1463; *P. Giess.* 2; *P. Freib.* III 29; *P. Teb.* I 104. These circumstances caused the importance of the *ekdosis* to decline.[91] An intermediate state is shown by *P. Giess.* 2 with its self-*ekdosis* of the bride, comparable to the self-*coemptio* of Roman law [92] (Gai. *inst.*

[90a] Therefore I am also unable to agree with Schönbauer's positive statement as recently given, *op. cit.* (see note 5) 57 f. His view that the second contract provided for in the *P. Freib.* was required by law in order to bring about some special effects is in my opinion excluded by the fact that the wife alone seems to be interested in having it drawn up. Schönbauer does not discuss the possible nature of those special effects. It should furthermore be considered that the custom of making two marriage contracts was apparently confined to documents of the first half of the second century B.C. and to cases of *συγγραφαὶ ὁμολογίας*. In *P. Teb.* III 815 the first contract is not yet a marriage contract, and the custom is abandoned as early as *P. Teb.* I 104, while during the whole Ptolemaic era no second contract was provided for when an *ekdosis* was made. Proof of this is furnished precisely for the time of the Freiburg papyri by *P. Giess.* 2.— For the Alexandrian *synchoreseis* see the next section of this chapter.

[91] Similarly Partsch, *op. cit.* 17. Cf. also Petropoulos, *op. cit.* 119.

[92] Cf. Partsch, *op. cit.* 17; P. M. Meyer, *Ztschr. Sav. St. Rom. Abt.* XLVIII (1928), 602; Petropoulos, *op. cit.* 119. This explanation of the self-*ekdosis* is more probable than its derivation from Macedonian customs (Th. Reinach and U. Wilcken [*Grundzüge* 216]; doubted by W. Schubart,

1.114).[93] During the second century B.C. at the latest the evolution reached the point where it was no longer generally believed that *ekdosis* was a necessary condition of lawful marriage. That final stage is certainly represented by *P. Teb.* I 104 of 92 B.C.; the fact that contractants were content with the homologia means from the viewpoint of marriage law, that the feeling had grown up that a marriage valid in law could be contracted by mere *de facto* joining of the couple.

Yet if I am right, the change had really happened some generations earlier, and, potentially at least, it was even inherent in the framework of the Greek family law in the Egyptian Chora from the very beginning. This is testified to, in some degree, by the sources themselves. The papyri of the first half of the second century B.C. exemplify a state of transition; the presence of a stipulation for drawing up a *συγγραφὴ συνοικισίου*, although rules concerning the marital life had been included in the *συγγραφὴ ὁμολογίας* and although the couple already lived together, indicates that *ekdosis* was also held to be necessary; the circumstance, however, that the *συγγραφὴ συνοικισίου* was not to be arranged except on request by the wife, shows that the necessity had degenerated into a merely social one. Had it been a legal requirement, the husband would have been particularly interested in its fulfilment for the purpose of obtaining paternal power over his children.[94] This is the fundamental fact. Since the family

Einführung in die Papyruskunde 485), or from an Egyptian influence (E. Kornemann, *P. Giess.* p. 6 ff.; Huwardas, *op. cit.* 5[2]). A very similar form is now attested at Dura too by *Dura Pap.* 74 (ed. C. B. Welles, *Dura Report* VI 433 f.; A.D. 232): *ἐ[ξωμολογή]σαντ[ο] κ[αὶ συ]νεγράψαντο π[ρὸς ἀλ]λή-[λ]ους—Αὐρήλιος Ἀλέξανδρος—καὶ Αὐρηλία Μαρκελλεῖνα—τὴν μὲν Μ[αρκελλ]εῖναν παραδεδωκέναι ἐαυ[τὴ]ν ἐκ χηρεί[ας] πρὸς γάμ[ο]υ κοινονε[ίαν . . . .]σι τῷ Ἀλεξάνδρῳ.*

[93] These Greek parallels support the general opinion, recently contested by P. E. Corbett, *The Roman Law of Marriage* (Oxford, Clarendon Press, 1930), 82 f., that the self-*coemptio* really was a fictitious self-sale. See pp. 76 ff.

[94] The usage seems to have lasted into the first century B.C., cf. *BGU.* VIII 1848 (Heracleopolites, B.C. 48/6), lines 6 ff.: *κατὰ συγγραφὴν συνοι[κισίας] καὶ ἄλλας ἐνθέσμους οἰκονομίας ἀνειρημένος σὺν τοῖς ἑαυτοῦ γονεῦσι Ἰσιδώρωι καὶ Φιλίσται φερνήν μου.* Perhaps it can also be inferred from *P. Sammelb.* III 7267

was no longer connected with a political and sacral organization, the solemn *ekdosis*, at one time a legal requisite for lawful contraction of marriage, that is, marriage which procured for the descendants entry into their father's phratry, and with it the enjoyment of full rights of membership in the family,[95] had lost its very practical value. Consequently, *de facto* unions could gain acceptance, although not positively authorized by any act of legislation.[96] The ceremony of

(*P. Jen. inv.* 40; Upper Egypt, 226 B.C.), lines 8 f.: *τὴν τοῦ συνοικισίου σου συγγραφὴν καὶ εἴ τινα ἄλλα βέβαιά σοι ὑπάρχει γράμματα ἔχουσα.* The text also might be an illustration of the almost contemporary *P. Teb.* III 815.—In *P. Berol.* 16121 both homologia and *συγγραφὴ συνοικισίου* are combined.—*BGU.* VIII 1827.20 f. is no parallel.

[95] W. Erdmann, *Die Ehe im alten Griechenland* (*Münchener Beiträge zur Papyrusforschung und antiken Rechtsgeschichte* XX; Munich, Beck, 1934), 369 ff. (with regard to Miletus); W. Graf Uxkull-Gyllenband, *Der Gnomon des Idios Logos; zweiter Teil: Der Kommentar* (*BGU.* V; Berlin, Weidmann, 1934), 26 (with reference to Alexandria). Cf. also U. E. Paoli, *Studi di diritto attico* (*Pubbl. della R. Univ. degli studi di Firenze, Facoltà di lettere e di filosofia*, N.S. IX, Florence, Bemporad, 1930), a treatise not accessible to me; I only know the report given by E. Weiss, *Ztschr. Sav. St. Rom. Abt.* LII [1932], 445 f.).

[96] This moots the question of the origin and legal basis of the whole Greek marriage law of Egypt. W. Schubart, *Einführung in die Papyruskunde* 281, believes that the private law of the Ptolemaic realm was founded, apart from royal decrees and native law, on *πολιτικοὶ νόμοι* which referred both to the cities and to the Greeks who did not belong to them (cf. also E. Bickermann, *Arch. f. Papyr.* VIII 227 f. and, most recently, W. Schubart, *ibid.* XII 39). In the opinion of Schönbauer, *op. cit.* (see note 5) 58, royal *prostagmata* were the legal foundation of the Greek Enchoric marriage law. But I think we have to assume, at least in relation to family affairs of Enchoric Hellenes, that there existed a customary law which was based upon common Greek ideas. No source mentions any statute dealing with such subjects; *P. Fay.* 22 only refers to Ptolemais, and the *nomos politikos* which is quoted in *P. Ent.* 23.3, if the restoration suggested in note 86 is correct (cf. E. Schönbauer, *Ztschr. Sav. St. Rom. Abt.* XLIX (1929), 353[3], and E. Berneker, *Krit. Vierteljahrsschrift für Gesetzgeb. und Rechtswiss.* LXII [1933], 392, but also *Dikaiomata* [*P. Halensis*, Berlin, Weidmann, 1913], p. 38 f., J. Partsch, *Arch. f. Papyr.* V 455, and U. Wilcken, *UPZ.* II 82), concerns Jewish law (see also *P. Gurob.* 2). In *P. Grenf.* I 21 (Mitteis, *Chrest.* 302; Pathuris, B.C. 126) the testator, Dryton, declares twice, lines 4 and 13, that he lives with his wife *κατὰ νόμους* (cf. Mitteis, introd. to *Chrest.* 302). See also addendum on page vi. But the mode of expression is very vague. I should think, therefore, that *κατὰ*

ekdosis, and the drawing up of a *συγγραφὴ συνοικισίου*, gradually came to be a mere custom of conservative people. The words of *P. Par.* 13: *μέχρι δὲ τούτου συνεῖναι αὐτοῖς ὡς ἀνὴρ καὶ γυνή*, which have indeed a tinge of fiction, may convey a hint of social disparagement of a union that was not founded on *ekdosis*.[97]

The difference, if there was any, between marriages based on an *ekdosis* and those contracted by mere union probably lay in the status of the married woman. It is tempting to recognize here the widespread—according to most recent researches [98]—dual form of marriage, that with and that without the husband's power over his wife. As a matter of fact, such an assumption seems to be supported by the circumstance that in *PSI.* VII 777, *P. Sammelb.* III 7239, and *BGU.* IV 1084, which attest the *agraphos gamos* for Alexandria, the husband is not the *κύριος* of his wife;[99] the fact that the unwritten marriage was legally equivalent to the homologia marriage will be demonstrated in the following chapter. I do not venture, however, to draw definite conclusions. In the Enchoric law of the imperial period *ekdosis* was practiced only to a limited extent and was, so it appears, almost confined to the Oxyrhynchite nome (see note 48), whereas the husband's guardianship seems to have been something quite normal. If a special inquiry, which cannot be made here, should show

νόμους means just "lawfully."—Very important to our question are the arguments of Arangio-Ruiz, *Persone e famiglia* 27 ff., especially 29.

[97] In this connection there is interest in the view (although it is contested by Freund, *Sitz.-Ber. Ak. Wien* CLXII 14, and, as it appears, by E. Seidl, *Ztschr. Sav. St. Rom. Abt.* LII [1932], 424[3]) of J. Neubauer, *Beiträge zur Geschichte des biblisch-talmudischen Eheschliessungsrechts* II (*Mitteil. der Vorderasiatisch-Aegyptischen Gesellschaft* XXV, Leipzig, Hinrichs, 1920), 238, who regards the document mentioned in *Tob.* 7.14 as desired for the purpose of raising the social reputation of the woman, but not as legally required.

[98] Herbert Meyer, *Ztschr. Sav. St. German. Abt.* XLVII (1927), 245 ff.; P. Koschaker, *Ztschr. für ausländisches und internationales Privatrecht* XI (1937), Sonderheft 121 ff.

[99] Cf. P. M. Meyer, note on *BGU.* 1084; G. Vitelli, *PSI.* VII 777, on line 7; Mitteis, *Grundzüge* 208; Wenger, *op. cit.* (see note 5) 74; Huwardas, *op. cit.* 49.

that the husband's κυριεία was considered by the Greco-Egyptian population of those times a matter of course, and not, or no longer, dependent upon the form chosen in contracting the marriage, this conclusion is not *a priori* inadmissible, for a tendency towards assimilation to marriage with *mundium* (husband's power) seems to be commonly inherent in marriage without *mundium*.[100] More important, however, is the fact that, owing to colonial conditions, the idea of domestic *potestas* obviously had weakened considerably. Evidence of this is almost as old as the colonization itself: *P. Eleph.* 1 is drafted in a manner which indicates that both of the spouses are considered equal, although formally the girl is given in marriage by her parents.[101] Likewise *P. Giess.* 2, *P. Gen.* 21, and *P. Teb.* I 104 show provisions which would belong to a free marriage[102] in combination with provisions properly essential to a marriage relation based on the husband's control over his wife; and all of the three contracts have been drafted in the same manner (see pp. 9–10), in spite of the fact that two of them are συγγραφαὶ συνοικισίου, and one a homologia. It is in my opinion precisely this decline in importance of the husband's *potestas* that explains the lack of any trace, either in Ptolemaic or in Roman Egypt, of the acquisition of marital power by *usus*.

Today we know, thanks to H. Meyer and P. Koschaker,[103] that marriages without *mundium* were practiced, along with those characterized by subjection of the woman to the husband's control, by many nations and from very primitive times. Whether, and to what extent, free unions were known to the Greek law of the classic period, is unknown to us.[104] We may pass over that question here. For the homologia

[100] Koschaker, *op. cit.* (see note 98), 126 ff.

[101] In substance the contract is one between the spouses themselves; see my article quoted in note 106, p. 181[1].

[102] See Koschaker, *op. cit.* 90[1].

[103] See the quotations given in note 98.

[104] Cf. Koschaker, *op. cit.* 122[1]. The existence of the idea in the law of the Homeric epics is shown by Koschaker, *op. cit.* 112.

marriage was by no means an original institution imported by Egyptian Greeks from their home-country together with *ekdosis*; it was an outgrowth of marriage by *ekdosis*. Nevertheless, this does not necessarily leave us in irreconcilable conflict with Meyer and Koschaker. If I am right, the fact that in our sources for Attic law there seems to be no hint of the existence of free marriage [105] is due to the importance that solemn contraction of marriage had for the public and sacral law of the *polis*. At least from the time of Solon on (Dem. 46.18) only descendants born of women married by *engyesis* and *ekdosis* were recognized as legitimate by the Athenian law, while in Egypt, as we have seen, it was precisely the absence of those public interests that made possible the contraction of lawful unions without a ceremonial *ekdosis*.[106]

IV. In conclusion we may state that contracts relating to marriages of the Greek population of Ptolemaic Egypt were purely Greek both in form and in legal conception.[107] The evolutionary development that I have described is not compatible with either Partsch's [108] hypothesis of an adaptation of Greek contract forms to the design of the Egyptian *συγγραφὴ τροφῖτις*, which, according to him, was substantially

[105] See Koschaker, *op. cit.* 112, 121 f.

[106] Nor was the Roman free marriage, in my opinion, a mere sequel to, or a modification of (so H. Meyer, *op. cit.* 245; Koschaker, *op. cit.* 126 f., 132), prehistoric unions without *manus;* rather it was an artificial modification of the marriage with *manus* by means of the *trinoctium* and for the purpose of preserving to women *sui iuris* their share in the *iudicium familiae erciscundae*, which had been introduced, together with the *trinoctium*, by the Twelve Tables; cf. my article "*Trinoctium*" in the *Tijdschr. voor Rechtsgeschiedenis* XVI (1938), 145 ff. In Rome, marriage had been freed of its connection with the domestic power considerably earlier than in the Greek *polis*, owing, as I believe, to the fact that the family law was not connected with the sacral and political organizations of the citizens as closely as it was in the latter.

[107] In the same way, although from other points of view, Arangio-Ruiz, *Persone e famiglia* 68 ff.; Huwardas, *op. cit.* 28[5]; Bozza, *op. cit.* 220 ff. Now to add: Schönbauer, *op. cit.* (note 5) 56.

[108] In Sethe-Partsch, *Demotische Bürgschaftsurkunden* (*Abh. Sächs. Ak.* XXXII, Leipzig, 1920), 580 ff., and *P. Freib.* III p. 19 ff.; cf. P. M. Meyer in *Raccolta di scritti in onore di Giacomo Lumbroso* (Milan, "Aegyptus," 1925), 227.

imitated by the Greeks, or Wilcken's [109] suggestion of a definite adoption of the native law. Moreover, either assumption stands or falls with the theory, still undisputed until a few years ago, of the coexistence of two types of marriage, different in quality, in the national Egyptian law. This is, however, contested by an increasing number of writers.[110] Petropoulos' [111] theory, finally, that the second contract was an instrument relating to Egyptian full marriage, necessarily contracted in written form, which Egyptian women insisted upon when they married Greek men, is not based on conditions that really existed,[112] and is in conflict with the undoubtedly Greek origin and character of the *συγγραφὴ συνοικισίου*.[113]

Nevertheless, it is not unthinkable that certain Egyptian ideas may also have affected the development of the Greek

[109] *UPZ.* I 580.

[110] H. Junker, *Papyrus Lonsdorfer I, ein Ehepakt aus der Zeit des Nektanebos* (*Sitz.-Ber. Wiener Ak.* CXCVII 2, Wien, 1926), 47 ff.; E. A. R. Boak, *Journ. of Eg. Arch.* XII (1926), 109, and *P. Mich.* II p. 30; W. F. Edgerton, *Notes on Egyptian Marriage, chiefly in the Ptolemaic Period* (*Studies in Ancient Oriental Civilization* I 1, Chicago, 1931), 1 ff., and in *Papyri und Altertumswissenschaft* (*Münchener Beiträge zur Papyrusforschung und antiken Rechtsgeschichte* XIX, Munich, Beck, 1934), 291; E. Seidl (after hesitation expressed in *Kritische Vierteljahrsschrift für Gesetzgebung und Rechtswissenschaft* LX [1930], 67) *ibid.* LXI (1931), 233, *Ztschr. Sav. St. Rom. Abt.* LII (1932), 425 f., and *ibid.* LV (1935), 353; Sir Herbert Thompson, *A family archive from Siut* (Oxford Univ. Pr., 1934), 71[2]. The former opinion is maintained by Arangio-Ruiz, *Persone e famiglia* 61 ff., and by G. Petropoulos, *Περὶ τῆς συζυγικῆς κοινοκτημοσύνης* (*Trans. Acad. Athens* II 1, Athens, *Γραφεῖον Δημοσιευμάτων Ἀκαδημίας Ἀθηνῶν*, 1932), 71 ff. Cf. also M. San Nicolò, *Arch. für Orientforschung* IX (1934), 7 (not accessible to me; quoted according to F. de Zulueta, *Journ. of Eg. Arch.* XX [1934], 100).

[111] *Acad. Athens* VI (1931), 118 ff., and *Κοινοκτημοσύνη*, 79[38]; followed by Bosdas, *op. cit.* (see note 5) 32. Petropoulos' statements have been questioned by F. Zucker, *Byzantinische Zeitschrift* XXXI (1931), 477 f. (quoted according to F. de Zulueta, *J. E. A.* XVIII [1932], 96), and rejected by Huwardas, *op. cit.* 28[5].

[112] Huwardas, *op. cit.* 28[5]; O. Montevecchi, *Aegyptus* XVI (1936), 12.

[113] Petropoulos, *Acad. Athens* VI (1931), 118, 119[1] himself emphasizes the Greek character of *P. Eleph.* 1. It is not thinkable that the same name was given once to documents of Greek law, and another time to those of Egyptian law.

marriage law of Egypt. Egyptian custom may be the source of the right conceded to the wife to divorce herself at any time without suffering any penalty [114] (*P. Freib.* III 30.22; *P. Gen.* 21.12 f.; *P. Teb.* I 104.30 ff.[115]). It is clear from *P. Eleph.* 1 and from the Alexandrian συγχωρήσεις (for example, *BGU.* IV 1050.23 f.), that Greek usage punished her by loss of dowry for breaking the marital tie, if this was not excused by some fault of her husband.[116, 117] If I am right in assuming Egyptian

[114] Cf. Mitteis, *Grundzüge* 212; Petropoulos, *Acad. Athens* VI (1931), 124.

[115] In the same way probably *P. Giess.* 2 where the pertinent part is missing in consequence of mutilation. The text has been entirely drafted according to the same scheme as were *P. Gen.* 21 and *P. Teb.* I 104; see pp. 9 f.

[116] Cf. also *Cod. Just.* 5.12.24: Diocletianus et Maximianus Augusti et Caesares Aurelio et Lysimacho (A.D. 294). Si dotem marito libertae vestrae dedistis nec eam reddi soluto matrimonio vobis in continenti pacto vel stipulatione prospexistis, hanc culpa uxoris dissoluto matrimonio penes maritum remansisse constitit, licet eam ingratam circa vos fuisse ostenderitis. The Roman law grants the right to demand back the dowry to divorced women, not under paternal power in any case, no matter whether it be a *dos profecticia* or *adventicia* (Ulp. *reg.* 6.6). Therefore the loss of the dowry referred to in the imperial rescript must have its basis in a provision of the marriage contract which had been made by the Greek parties, as in the papyri quoted above. (Erroneously Mitteis, *Reichsrecht und Volksrecht* [see note 2] 244; L. Tripiccione, *op. cit.* [see note 5] 84; P. Bonfante, *Corso di diritto romano* I [Rome, Sampaolesi, 1925], 348[1]). Cf. *Cod. Just.* 8.38 (39).2 of A.D. 223.

[117] J. Partsch, *Demot. Bürgschaftsurk.* (see note 108) 697[1] thinks the guarantee by the husband's mother in *BGU.* IV 1051 is Egyptian law, which is an opinion held also by Taubenschlag, *op. cit.* (note 83) 270. It is not very probable that Egyptian customs had been adopted at Alexandria, but on the other hand, it must be remembered that in *BGU.* IV 1051 the contractants seem not to be Alexandrian citizens; see note 158.—Petropoulos, *Acad. Athens* VI (1931), 123 f., holds that κοινῇ κυριεύειν is also Egyptian. But I am far from convinced. According to Arangio-Ruiz, *op. cit.* 52 ff., the main feature of the Egyptian joint family property was the *ius ad rem* of the descendants (cf. also Huwardas, *op. cit.* 43 f.) which is never stipulated in Ptolemaic Greek marriage contracts; on the other hand, such or similar features may be purely Greek, as appears from *P. Eleph.* 2 (see note 41). The Greek author's opinion is the less maintainable, if E. Seidl is right in asserting (*Aegyptus* XIII [1933], 82 f., *Ztschr. Sav. St. Rom. Abt.* LV [1935], 353; cf. also *Studia et Documenta Historiae et Iuris* II [1936], 241) that under the Egyptian law the husband sometimes transferred all his property to his wife. Cf. also Wilcken, *UPZ.* I 579.—

influence in this case,[118] the fact is important because it shows the relation between Greek and native law relating to marriage. The dominant people adopted from the subject people here and there some special custom that could readily be adjusted to the framework of its own legal system; but the fundamental concepts of the system did not suffer any alteration, and the actual evolution was determined exclusively by principles of Greek law and life.

2. Alexandrian Law

I. In the well-known marriage *συγχωρήσεις* of Alexandria (*BGU.* IV 1050–1052, 1098–1101, time of Augustus) the wife and the husband formally acknowledge[119] before a certain Protarchos (in *BGU.* IV 1098: *τῶι ἐπὶ τοῦ ἐν τῆι αὐλῆι κριτηρίου*)[120] that they have come together for a joint life (*πρὸς βίου κοινωνίαν*).[121] In two instances, 1098 and 1100, the parents of the bride state that they have given their daughter to the man. In all of the contracts the man acknowledges that he has received a *φερνή*. Provisions follow concerning the support of the wife (*ὡς γυναῖκα γαμετήν*) by her husband, and reciprocal loyalty and fidelity, with a stipulation for the restitution of the dowry with *ἡμιόλιον* or for loss of the dowry, in case the one or the other spouse fails to fulfil the contract. Finally the couple in several instances agree to make deposition of a *περὶ γάμου* or *συνοικισίου(?) συγγραφή*[122] before the *hierothytai*

For the period of grace granted to the husband for the return of the dowry in case of divorce see Mitteis, *Grundzüge* 219.

[118] For a possible reason for the Greek principle, which corresponds to a penalty of 50% to 100% of the value of the dowry assessed upon the husband, if guilty, see p. 79 and note 283.—It might appear that the reason for the wife's freedom of divorce lay in the decline of the idea that the wife was under her husband's control. But *BGU.* IV 1050 no doubt testifies to a free marriage, whereas *P. Giess.* 2 and *P. Gen.* 21 are *συγγραφαὶ συνοικισίου*. Further discussion of the problem is reserved.

[119] On the formal side of the texts see W. Schubart, *Arch. f. Papyr.* V 47 ff.; Mitteis, *Grundzüge* 65 ff.

[120] *BGU.* IV 1100 lacks the address.

[121] Except *BGU.* IV 1050.6 which reads *πρὸς γάμο(ν)*.

[122] *BGU.* IV 1098: *τὴ[ν] δι' ἱεροθυτῶν συγγραφή[ν]*.

within five business days after having given notice to each other; and in some of the papyri the content of the document agreed upon is briefly outlined: for example, *BGU.* IV 1050 (Mitteis, *Chrest.* 286; Meyer, *Jur. Pap.* no. 19), lines 24 ff.: *θέσθαι* [δ]*ὲ αὐτοὺς καὶ τὴν ἐφ' ἱεροθυτῶν περὶ γάμου συνγραφὴν ἐν ἡμέραις χρηματιζούσαις πέντε ἀφ' ἧς ἂν ἀλλήλοις προείπωσιν καθ' ἣν ἐνγραφήσεται ἥ τε φερνὴ καὶ τἆλλα τὰ ἐν ἔθει ὄντα καὶ τὰ περὶ τῆς ὁποτέρου τῶν γαμούντων τελευτῆς, ὡς ἂν ἐπὶ τοῦ καιροῦ κοινῶς κριθῆι.* Cf. *BGU.* IV 1101.19 f.: *θησόμεθα καὶ διὰ τῶν ἱεροθυτῶν τοῦ συνοικ(ισίου) συγγρα(φὴν) ..... καὶ τὰ καθήκ(οντα).* This provision is definitely lacking in *BGU.* IV 1052; *BGU.* IV 1099 and 1100 are uncertain because their pertinent parts are missing.

This double documentation of the same union is commonly identified with the same phenomenon that is attested for the Chora. But a comparison with the Enchoric contracts shows that there are considerable differences. When Enchoric contracts provide that a second document, a *συγγραφὴ συνοικισίου,* shall be drawn up, it is the husband who will be obliged to do it on request of his wife, whereas at Alexandria the drawing up of the *hierothytai* contract depends on a previous agreement of the spouses.[123] Furthermore, as a matter of fact, the two groups do not correspond to each other. It is true that the second contract sometimes seems to have been called *συγγραφὴ συνοικισίου* in Alexandria also (*BGU.* IV 1101; the reading is very uncertain), but the *συγχώρησις* is by no means equivalent to the Enchoric *συγγραφὴ ὁμολογίας.* The latter, as we have seen, had developed from an acknowledgment on the part of the husband, of receipt of the dowry, and had later incorporated stipulations concerning the marriage itself. The way of drafting the Alexandrian marriage *συγχώρησις* shows that from the beginning this instrument was drawn up to attest above all the fact that people had united in a joint life. Hence the Alexandrian dualism must have been based on reasons different from those operative in the Enchoric law. I believe that it is possible to discover them.

[123] See Huwardas, *op. cit.* 26.

II. The legal effectiveness of the Alexandrian marriage *synchoresis* has never been doubted by scholars. It is quite evident from the texts themselves, which mention the constitution of joint marital life in the perfect tense: *συνεληλυθέναι, ἐγδέδοται.* Reciprocal rights and duties are effective at once, and are secured by sanctions. Last but not least, we may appeal to contemporary Alexandrian divorce contracts (*BGU.* IV 1102.8 ff.: *κεχ[ω]ρίσθαι ἀπ' ἀλλήλων τῆς συστ[ά]σης αὐτοῖς συνβιώσεως κ[α]τὰ συγχώρησιν διὰ τοῦ αὐτ[οῦ] κριτηρίου*; cf. *BGU.* IV 1103) and to *BGU.* IV 1105.3 ff. (in I. C. Naber's very probable restoration of the text): [124] *'Ασκληπιάδ]ης [ᾧ συνοικοῦσα τυγχάνω συμπείσαντι] τοὺς γονεῖς ἀ[κούσης ἐμοῦ] Τρυφαίνης, ὅπως ἐγδῶνταί με αὐτῷ,—⟦κατὰ τὴν⟧ <κατὰ τὴν> τετελεσμένην συνχώρησιν κτλ.* The only dispute is about the nature and importance of the second document and about its relation to the *synchoresis.*

According to *BGU.* IV 1050 the contract before the *hierothytai* was to deal with the dowry and with the disposition to be made in case of the death of either during marriage. As to the latter part, W. Schubart's [125] interpretation of the document as a joint will is acceptable, more especially since the prior express mention of the *pherne* excludes the conclusion that the agreement concerned merely the dowry.[126] His opinion is erroneous,[127] however, in so far as it regards the will as being the only or the principal purpose of the *hierothytai* document. This is due to his disregard of the middle link in the enumeration: *τἆλλα τὰ ἐν ἔθει ὄντα.* I believe, "the other usual matters" referred to can only be the usual rules to govern marital life. It is true that rules like these were already included in the *synchoresis*, and so might appear here at first sight to be a useless repetition.[128] But as a matter of fact, the *syngraphe*—despite the prior *synchoresis* which also

[124] *Aegyptus* XI (1931), 181 f.

[125] *Arch. f. Papyr.* V 75, 78 f.; approved by Partsch, *P. Freib.* III p. 19[1].

[126] According to Bozza, *op. cit.* 244, the *hierothytai* deed concerned the restitution of the dowry in case of divorce or death of either of the spouses.

[127] Cf. Wilcken, *UPZ.* I 580[1].

[128] In this way, e.g., Bozza, *op. cit.* 242.

refers to an actually existing marriage—is really a new marriage contract. This is rendered, in my opinion, incontestable by its name: *περὶ γάμου* or *συνοικισίου συγγραφή*. The act before the *hierothytai* is the contraction of the marriage a second time.

What was the reason for this duplication? As far as pertinent parts of the documents have been preserved, the contents of the *hierothytai* contract are anticipated only in *BGU.* IV 1050 among known marriage *synchoreseis*. Therefore it seems to me not unlikely—on account of the detailed enumeration—that this is an individual feature of that papyrus.[129] Consequently the meaning of the contract before the *hierothytai*, and the difference between the marriage constituted by it and the *synchoresis* marriage, cannot be found in the contents of documents relating to either kind of marriage, but in the function of the *hierothytai* themselves.[130]

Apparently the *hierothytai* marriage was the more solemn form of marriage used at Alexandria at the time of Augustus.[131] Nevertheless, here too it is improper, in my opinion, to speak of the *synchoresis* marriage as a fictitious, "loose," or "preliminary" marriage, in contrast with the other, the *hierothytai* marriage as the definite and "full" marriage.[132] The only argument adduced by Wilcken and Huwardas for this supposition, the use of *ὡς*,[132a] is weak; not only is the fictitious meaning of *ὡς* disputed,[133] but—and this is decisive, even if

[129] Cf. also line 30: *ὡς ἂν ἐπὶ τοῦ καιροῦ κοινῶς κριθῆι.*

[130] Our statement excludes the conjecture once made by Mitteis, *Grundzüge* 214, and accepted by P. M. Meyer, *Jur. Pap.* p. 41, that the *hierothytai* contract was merely a religious confirmation of the civil marriage contracted through *synchoresis*. Their hypothesis has already been rejected for good reasons by Huwardas, *op. cit.* 24[2].

[131] About Arangio-Ruiz, *Persone e famiglia* 70 f., see p. 25.

[132] Wilcken, *UPZ.* I 580; Huwardas, *op. cit.* 23 f.—E. Weiss, *Griechisches Privatrecht I* (Leipzig, Meiner, 1923), 313 f., regards the *synchoresis* as a marriage contract—apparenty effective—but simultaneously as a precontract; cf. Mitteis, *Grundzüge* 215. Against Weiss: Huwardas, *op. cit.* 24[3].

[132a] *BGU.* IV 1050.12 f.: *τρέφειν καὶ ἱματίζειν τὴν Ἰσιδώραν ὡς γυναῖκα γα[μετήν]*. Similarly the other texts.

[133] See Partsch, *op. cit.* 20 (against Mitteis, *Grundzüge* 205); Kunkel,

the word was used originally for denoting a fiction in quasi-matrimonial agreements [134]—the union is sometimes called, without any reservation, precisely a *γάμος*; note *BGU.* IV 1050.6: *συνελη̣λυθέναι—πρὸς γάμον*, *BGU.* IV 1105.9: *συνῆλθεν πρὸς τὸν γάμον*. Furthermore, the *synchoresis* marriage was not "looser" than the *hierothytai* marriage, which also permitted divorce, as *P. Fay.* 22 shows; the principal details, possibly all of them, can be fairly claimed for Alexandria and Ptolemais alike. Finally the *synchoresis* marriage was not "preliminary"; it was not necessary to change it into the other form, and in my opinion the *hierothytai* marriage could be contracted without any previous stage of *synchoresis* marriage; *synchoreseis* never mention any completion of the first act through the second, which would mark the first as a preparatory stage, but the conclusion of an entirely new contract.

To settle our problem we have to determine the function of the *hierothytai*. Apparently they existed exclusively in the cities of Alexandria and Ptolemais [135] (*P. Fay.* 22),[136] and not

Gnomon IV (1928), 668; Bozza, *op. cit.* 224; Kübler, *Phil. Wochenschr.* LV (1935), 529; O. Montevecchi, *Aegyptus* XVI (1936), 70. Partsch and Bozza refer to *P. Par.* 13.—Authors who believe in the fiction are quoted by Huwardas, *op. cit.* 23[2]; to be added: A. Steinwenter, *Ztschr. Sav. St. Rom. Abt.* XLIX (1929), 657; Arangio-Ruiz, *op. cit.* 66, with reference to *PSI.* I 64; M. San Nicolò, *Ztschr. Sav. St. Rom. Abt.* LIII (1933), 550.

[134] See pp. 29 and 45.

[135] It is not likely that they existed at Naucratis also. As we shall see immediately, their activity in marital affairs seems to have been important chiefly in connection with the membership in a *demos* of children born in a *hierothytai* marriage. It is suggested that Naucratis did not have either *phylai* or *demoi*, see Wilcken, *Grundzüge* 13.—As to Antinoupolis see note 156.

[136] Mitteis, *Chrest.* 291.—It does not matter here whether the fragment was a royal *diatagma* or a *psephisma* of Ptolemais. It is taken in the former sense by the first editors, Grenfell and Hunt, and recently by Huwardas, *op. cit.* 20; in the second sense by W. Schubart, *Arch. f. Papyr.* V 76 and others named by E. Weiss, *op. cit.* (see note 132), 314[233]; furthermore E. Levy, *Der Hergang der römischen Ehescheidung* (Weimar, Boehlau, 1925), 105; Arangio-Ruiz, *op. cit.* 70; R. Taubenschlag, *Studi in onore di Salvatore Riccobono* (Palermo, Castiglia), I 511. I prefer this opinion. Schönbauer, *op. cit.* (see note 5) 58, believes that the text is a *prostagma* concerning the activity of the *thesmophylakes*.

in the Chora.[137] Our texts, as well as *P. Fay.* 22, show that they were a board especially concerned with matrimonial arrangements, and Huwardas [138] has pointed out, on the basis of *P. Fay.* 22, that one of the duties entrusted to them was that of passing on the personal status of the couple.[139] Those facts, together with the fact that the *hierothytai* were a board of *priests*, give, I think, the clue to their rôle in matrimonial affairs. We know that in both Alexandria and Ptolemais the old Greek organization of the population persisted under which every citizen had to belong to phyle, deme, and phratry, the last being a cult community.[140] As in other Greek *poleis*, or at least in Athens,[141] the phratry was beyond doubt concerned in some way with the marriages of its members. It is reasonable to suppose that it is in this connection that we find the *hierothytai* active in matrimonial affairs. They formed a *sacral* council before which marriage contracts had to be drawn up. The *hierothytai*, as a council of priests, were apparently charged with supervision of the religious organization of the citizens.

This is a hypothesis of course. But it finds indirect support in a small fragment of Damascius, quoted by Phot. *Bibl.* 242 (p. 338 B Becker). As far as it refers to our subject, it states: *οὐκ ἦν γνήσιος ὁ γάμος* (*scil.* *παρὰ τοῖς* Ἀλεξανδρεῦσιν), *εἰ μὴ ὁ ἱερεὺς ὁ τῆς θεοῦ ἐν τοῖς γαμικοῖς συμβολαίοις ὑπεσημήνατο χειρὶ τῇ ἑαυτοῦ.* It is true that this is not in full agreement with our papyri. Nevertheless we shall hardly be mistaken in holding the signing of a marital document by the priest of some female

[137] Erroneously Kübler, *op. cit.*

[138] *Op. cit.* 21, 27.

[139] The board indicated in *P. Fay.* 22.3 as addressees of the *apographe* was probably the *hierothytai* (Huwardas), and not the *thesmophylakes*, as was formerly supposed (see, e.g., Mitteis' completion of the line), and is still the view of Schönbauer (see note 136).

[140] *P. Hib.* 28 (Wilcken, *Chrest.* 25); Wilcken, *Grundzüge* 16; cf. also W. Schubart, *Einführung in die Papyruskunde* 244 f. Bozza, *op. cit.* 241, considers a possible suppression of the phratries in the Roman period, but her view is absolutely unfounded.

[141] Erdmann, *op. cit.* (see note 95) 133, 262 ff

deity [142] to be a part of the act which is hinted at in the *synchoreseis*. This is evidence that that act had a religious effect in addition to the civil character inferrable from *BGU.* IV 1050, and furthermore, that it was a condition of a γνήσιος γάμος. This means, since the *synchoresis* marriage was a real marriage also, that the marriage contracted before the *hierothytai* was in some way higher in legal esteem than the *synchoresis* marriage.

Considering the facts that the *synchoresis* document normally dealt with dowry and the reciprocal rights and duties of husband and wife, that even the *ekdosis* was conformable to it (*BGU.* IV 1100, 1105), and that children born in such marriages apparently had full rights of succession to their sathers (*P. Oxy.* II 268: Mitteis, *Chrest.* 299),[143] we have to eek the particular importance of the *hierothytai* marriage in the sphere of public law rather than of private law. I suggest that the descendants secured a higher status in certain respects in public law as a result of the *hierothytai* marriage; and I believe that several papyri relating to the *ephebeia* of sons of Alexandrian citizens actually support this inference.

There is a group of texts—*PSI.* VII 777 (first or second century A.D.), *P. Sammelb.* III 7239 (A.D. 140/1),[144] and *BGU.* IV 1084 (Wilcken, *Chrest.* 146; A.D. 149) [145]—in which entry of Alexandrian boys among the ephebes is certified; "this is followed by a précis of the return of birth of a named person, obviously the boy whose entry among the ephebi has already been noted." [146] In this latter part it is uniformly stated that the parents of the *ephebus*, both being Alexandrian citizens, are living in unwritten marriage: φάμενοι συνεῖναι ἑαυτοῖς ἀγράφως. This is apparently contrary to the practice attested by the

[142] Hera? Aphrodite? Artemis? Cf. Plut. *Quaest. Rom.* 2. Erdmann, *op. cit.* 251[4].

[143] Huwardas, *op. cit.* 31, 33.

[144] Papyrus of the library of the University of Michigan, ed. H. I. Bell, *Journ. of Eg. Arch.* XII (1926), 246.

[145] A fourth instance seems to be *P. Sammelb.* III 7171 (A.D. 186), but the part interesting here has been broken off in this text.

[146] Bell, *op. cit.* 245.

copy of an *εἴσκρισις* preserved in *P. Flor.* I 57 (republished as no. III 382; Wilcken, *Chrest.* 143; Hermopolis, A.D. 166), where we read in lines 78 ff.:

Ἥρων Ἀντωνᾶ[τος] τοῦ Πανίσκου Ἀλθ(αιεὺς) (ἐτῶν)
ιδ' ἡμ(ερῶν) ιζ' . . . . . ο.ο
[. . . . .]τ̣ μανθ(άνων) γράμμ(ατα) καὶ πὰ λ μ[η]τ(ρὸς) Ἀρητοῦτος τῆς
καὶ Ἡρωνοῦτος Ἥρωνος ἀστῆ<ς>
80 . . . . .μενος ὑπὸ τῶν γονέων καὶ γν[ωσ]τευ[όμε]νος ὑπὸ ἀδελφοῦ
Πανίσκου καὶ θείου πρὸς
μητρὸς [147] Κορνηλίου τοῦ Ἥρωνος . . . . . σ.ου παιδὸς
ἀπαρχη [148] δι' ἧς δε[ί]κνυται
[ἔνγρ]αφος ὁ τῶν γονέων γάμος, ἐφηβευκ[ότος] τ[ο]ῦ πατρὸς
καὶ οὔτε κατὰ μητέρα.α . . .αυ
[. . . .] περιῃρέθη τὸ πρὸς τὴν ἴσκρισιν κτλ.

The *aparche* should not be identified with the return of birth quoted in the three texts mentioned before. Not only is the latter not called *aparche*, but it is apparently different in both form and purpose from the *aparche*, which, whatever may have been its special nature,[149] was some document to

[147] The second name, Heron, implies that Cornelius is rather an uncle on the maternal side, despite Vitelli's reading *πατρός*.

[148] Possibly *χρώμενο]ς <τῇ> τοῦ παιδὸς ἀπαρχῇ*; cf. *P. Teb.* II 316 (Wilcken, *Chrest.* 148), lines 10, 50, 83. Another possible restoration is *[σημανθέντο]ς τοῦ παιδὸς ἀπαρχῇ*, according to *P. Sammelb.* V 7561 (*P. Gen. inv.* 76; ed. V. Martin, *Chron. d'Égypte* [1932], 301), line 4. If I am right, the photograph of *P. Gen.* (p. 303) shows a hook after *σημην*, and I should accordingly like to suggest the reading *σημην(άμενος) ἀ[παρ(χῇ)]*. If this is correct, some of the questions whose absence is noted by Martin, *op. cit.* 309, in the oral examination of the boy would have been answered in the *aparche*; see p. 42. As to *σημαίνω* cf. *P. Flor.* III 382.83, 88. Vitelli's reading *ἀπὸ γυμνασίου παιδὸς ἀπαρχῇ* seems to me very unlikely.

[149] See above all W. Schubart, *Raccolta di scritti in onore di Giacomo Lumbroso* (Milan, "Aegyptus," 1925), 61 ff., whose statements seem to agree with the hypothesis given in the text. Furthermore, cf. Wilcken, *Chrest.* 143, on line 8; F. Preisigke, *Fachwörter des öffentlichen Verwaltungsdienstes Aegyptens in den griechischen Papyrusurkunden der ptolemäisch-römischen Zeit* (Göttingen, Vandenhoeck and Rupprecht, 1915), *s.v. ἀπαρχή* 3, with the authors quoted there; E. Bickermann, *Arch. f. Papyr.* VIII 228[1];

be produced by the parents in order to obtain an official acknowledgment that the child was born to Alexandrian citizens, whether the child was a boy or a girl.[150] As is proved by *P. Flor.* III 382 and *P. Teb.* II 316 (Wilcken, *Chrest.* 148), it was a regular legal prerequisite for the *ephebeia*. Nevertheless it seems to have been missing in the cases of *PSI.* VII 777 and its parallels. The reason for this fact was obviously that the parents of the boys referred to were living in unwritten marriages, the mention of which in all three papyri is certainly not accidental, whereas in *P. Flor.* 382.81 f. it is precisely the *aparche* that proves that the parents of the boy are living in an *engraphos gamos*. When the parents did not live in "written" marriage, the qualification of their sons to become ephebes must have been attested in some particular way thus far unknown to us.[150a]

Simultaneously we get an explanation of the fact that Heron (*P. Flor.* 382) was already a member of a deme when he was presented for the *eiskrisis*,[151] whereas in other cases Alexandrian citizenship seems to have been dependent on *ephebeia*.[152] A young Alexandrian who had his *aparche*, that is, who was born in an *engraphos gamos*, got membership in his deme and citizenship without any further condition on completing his fourteenth year; note as an indirect testimony *Gnomon of the Idios Logos* § 47: ἐὰν δὲ καὶ ὑπὸ ἀμφοτέρ[ων ἀπ]αρχὴ τέκνων τεθῇ, τηρεῖται τοῖς τέκνοις ἡ πολιτεία. If he could not produce an *aparche*, he did not obtain the mentioned rights until he had

P. M. Meyer in E. Seckel-P. M. Meyer, *Zum sogenannten Gnomon des Idioslogos* (*Sitz.-Ber. Preuss. Ak.* 1928, XXVI), 32.

[150] Cf. *P. Flor.* III 382.86.

[150a] Professor C. B. Welles suggests that the *aparche* was a sacrifice or offering offered at birth of a son by parents married according to phratry provisions, that this offering was not accepted from other parents, and that it was attested by a written receipt. There is no evidence for the truth of this suggestion, but it provides an explanation of the term ἀπαρχή and does not conflict with the view that I have set forth.

[151] Wilcken, *Chrest.* 143, on line 78.

[152] *P. Lond.* 1912.53 (H. I. Bell, *Jews and Christians in Egypt* [Brit. Mus., 1924], 23 ff.). Cf. Bell, *op. cit.* (see note 144) 245; W. Schubart, *Die Griechen in Aegypten* (*Beihefte zum 'Alten Orient'* X; Leipzig, Hinrichs, 1927), 17.

served as an ephebus, the actual entry among the ephebi probably depending upon some other conditions.[153] The boy whose examination is reported in *P. Sammelb.* v 7561 is already a citizen, and it is not unlikely that he actually had produced an *aparche*; see note 148. The Alexandrian Ammonios, on the other hand, who solicits *eiskrisis* for his son, Nilammon, in *P. Oxy.* III 477 (Wilcken, *Chrest.* 144; A.D. 132/3) does not refer to an *aparche*, and the official [154] subscription to his petition merely reads: [Νειλάμμων Ἀμμωνίου ἔφη]βος ἀπ' Ὀξ(υρύγχων) [πόλ(εως)]; obviously the boy is named here with his full name, and this means that he does not belong to a deme as yet.[155]

This conclusion, if true,[156] is applicable to our problem. Ἀγράφως συνεῖναι in *PSI.* VII 777, *P. Sammelb.* III 7239, and *BGU.* IV 1084, cannot mean the *synchoresis* marriage of course. But from the standpoint of the Alexandrian marriage law, it may be considered as an analogous union. As we shall see in the next chapter, the Greek ἀγράφως συνεῖναι—acknowledged as a lawful marriage throughout the Hellenistic world—was

[153] Otherwise Arangio-Ruiz, *op. cit.* 76; Petropoulos, *Acad. Athens* VI (1931), 128. Huwardas' supposition, *op. cit.* 50², that conversion of the parental marriage into a written one might have been required is also very unlikely.

[154] Wilcken, *Chrest.* 144, to line 26.

[155] P. M. Meyer, *op. cit.* (see note 149), links the citizenship with both conditions, *aparche* and ephebate. E. Weiss, *op. cit.* (see note 132) 385[87] supposes the *aparche* to be the only, and always necessary, condition. Both authors are refuted by the difference which exists between *P. Flor.* III 382 and the other texts, except perhaps *P. Sammelb.* v 7561.

[156] It does not conflict with the fact—as indicated by the certificates, *P. Sammelb.* v 7603 and 7604 (ed. H. I. Bell, *Aegyptus* XIII [1933], 253 f., 256), and the application for such a certificate, *PSI.* IX 1067—that at Antinoupolis the *aparche* was not connected with any special form of the marriage of the child's parents. For Alexandria at any rate this connection is shown by *P. Flor.* 382. As to Antinoupolis, on the other hand, the non-existence of a solemn marriage like that contracted before the *hierothytai* does not surprise us. This form depends upon the condition of both husband and wife as citizens, belonging to the same religious community, and was, hence, impossible in a city to which intermarriage with Egyptians had been granted (see Wilcken, *Chrest.* 27; *Grundzüge*, 51). Thus I believe that the documents cited rather support our hypothesis.

based, like the homologia marriage, on the cohabitation of the couple; and it only differed from the homologia marriage in that the written contract was omitted. On the other hand, the Alexandrian *synchoresis* also documented, as we have seen (p. 36), a union *already accomplished*, whether by *ekdosis* or by *de facto* joining (*συνέρχεσθαι πρὸς βίου κοινωνίαν*). Both the marriage attested by a *synchoresis* and the one contracted absolutely *ἀγράφως* lacked the solemn sacral form of the marriage contracted before the *hierothytai*. For the latter type of marriage a document was necessary, and thus it could be called *engraphos*.[157] But the only definite difference that existed between the two kinds of marriage was presence or absence of the sacral form, since the *hierothytai* marriage could also be contracted by the spouses themselves, that is, it probably needed no *ekdosis* (see, for example, *BGU.* IV 1050). We may conclude, therefore, that the distinction that seems to be made with regard to the political status of children born of a "written" marriage and those born of an "unwritten" marriage also differentiated the *hierothytai* marriage from the *synchoresis* marriage.[158]

Of course it is not possible to present more than a hypothesis. But this hypothesis offers a possible explanation of the interest of married people in contracting at a later time a marriage before the *hierothytai*, as well as in postponing it temporarily. We may suppose that a couple marrying in that way had to

[157] *P. Flor.* 382.83. The decipherment is not certain. As Miss T. Lodi who kindly consulted the original wrote me, the only letter to be deciphered beyond doubt in [ἔγγρ]ạφος is ς. Should it be possible to read [γνή]σ̣ι̣ος, this would support our thesis even better. Cf. also Schubart, *Raccolta di scritti in onore di Giacomo Lumbroso* (Milan, 1925), 65.

[158] It follows that the marriage contracted before the *hierothytai* must have been an institution especially proper to citizens. It is true that the contractants in *BGU.* IV 1051 who provide for the conversion of their marriage into the sacral form seem not to be Alexandrian citizens. Nevertheless, considering the harmony of all the other sources, I do not believe that any objection to our statements can be based on this. The provision must have been erroneous in their case. The *synchoresis* marriage was clearly available to non-citizens. It is interesting that in *BGU.* IV 1052, where the reservation is omitted, the contractants were not citizens either.

pay a fee [159] which was probably higher than that for recording a *synchoresis*. I believe that a *hierothytai* marriage was not contracted until there were children whose interests required it. Some such reason perhaps also explains the other fact that in *BGU.* IV 1050 dispositions about succession to either of the couple were reserved for the *hierothytai*. On the other hand, the circumstance that in *BGU.* IV 1101 divorced people remarry by a *synchoresis* in spite of the existence of a child born to them in their first marriage does not conflict with our view. This child was a daughter; apparently the contractants did not hold it necessary to contract their new marriage before the *hierothytai* [160]—there was postponement in this case too—because women could not belong to the political and sacral organizations of Alexandrian citizens.[161] Obviously the fact that the parents were living in a *hierothytai* marriage brought advantages exclusively, or at least chiefly, to sons with reference to their political status—a conclusion which, in its turn, supports our theory about the nature and importance of this type of marriage.

It is impossible to ascertain whether or not the *synchoresis* marriage had been acknowledged as lawful from the beginning. Perhaps the use of ὡς in the *synchoreseis* was a residue of an original practice when this form was considered as a mere fiction—a state, however, which had certainly been superseded at the time of our documents, if indeed it ever existed.

That both forms, *hierothytai* marriage and *synchoresis* marriage, were also common at Ptolemais seems to follow from *P. Fay.* 22 and *P. Oxy.* II 268 (Mitteis, *Chrest.* 299; A.D. 58). The persons who had contracted a *synchoresis* marriage according to the latter text apparently were citizens of Ptolemais.[162]

[159] Cf. Weiss, *op. cit.* 387, with reference to Ephesus. C. B. Welles suggests that the fee was probably required for sacrifice, as before priests.

[160] Or could it have been caused by the fact that the husband was merely an Ἀλεξανδρεύς who did not belong to a deme? I prefer the explanation given above.

[161] Wilcken, *Grundzüge* 15.

[162] Cf. lines 2 and 4.—See also Schubart, *Arch. f. Papyr.* V 78; E. Bickermann, *Rev. de Philol.* LIII (1927), 364[2].

III. It remains to compare the marriage law of Alexandria and Ptolemais with that of Athens. In all three cities the political organization required the observation of certain solemnities in contracting marriage. But at Athens it was precisely the private transactions of *engyesis* and *ekdosis* that brought about the lawful marriage. *Engyesis* and *ekdosis*, apart from the marriage of the ἐπίκληρος, were not only indispensable, but the only prerequisites for lawful marriage both in private and in public and sacral law. The ceremony performed afterwards in the husband's phratry by offering the γαμηλία had no legal importance, except that it served as evidence.[163] In the cities of Egypt private and public effects of marriage were definitely separated from each other at the time represented by our source material. Public validity depended upon the drawing up of a public deed before a council of priests, but it did not matter in what way the couple had united; there might be *ekdosis* in connection with the *synchoresis* marriage, or *ekdosis* might be omitted in the marriage contracted before the priests (see pp. 40, 44). Private law, in its turn, acknowledged any union, whether founded on *ekdosis* or not, and without requiring the completion of the forms of public and sacral law.

I believe that this difference is characteristic. At Athens the phratries had developed out of consanguineous groups;[164] their political and family functions were inseparably connected with each other. Alexandria and Ptolemais were new cities, and their phylae, demes, and phratries were but artificial imitations of those of Athens;[165] they were no longer based on the blood relationship of the citizens, who, coming from all over the Greek world, had severed their connection with their original clans. Like the Enchoric Greeks, they brought with them the family law of the mother country, but this, as in the

[163] W. Erdmann, *op. cit.* (see note 95) 265.

[164] See, e.g., B. Keil, *Griechische Staatsaltertümer* (in Gercke-Norden's *Einleitung in die Altertumswissenschaft* III² [Leipzig, Teubner, 1914], 309 f.; P. Koschaker, *Ztschr. f. Assyr.* N. F. VII (1933), 78².

[165] Wilcken, *Grundzüge* 16.

Chora, lacked the protection afforded in the old *polis* through its connection with the public law. Thus it fell into decay in the cities also. By the time of Augustus at the latest, this evolution had reached the point where the *de facto* marriage was considered as equivalent in private law to the marriage contracted through *ekdosis*, whereas the necessities of public law had caused the development of a special form of marriage contract which was important only in that sphere.

CHAPTER II

ΑΓΡΑΦΩΣ ΣΥΝΕΙΝΑΙ

There are few subjects in the field of ancient legal history about which opinions have been as divergent as about the marriage law of the Greek papyri of Roman Egypt. The main problem is to determine the relation between written and unwritten unions, for both of which we have evidence in our sources.[166] To be sure, the present state of our source materials does not at the moment permit an answer to all the questions that arise. Nevertheless I believe that we are able, on the basis of our conclusions in the preceding chapter, to reach a probable hypothesis about the general character of both types of union.

I. There are two fundamental facts which may be put first in our research:

1. Thanks to Wenger's inquiry into the use and meaning of *ἄγραφος* in legal sources, there is full evidence of the fact that the *agraphos gamos* was not, as has been supposed by some authors,[167] an *unregistered* marriage as opposed to the *engraphos gamos*, which, in the opinion of the same writers, was a marriage recorded in some public register. It was really, in entire

[166] Since Mitteis, *Grundzüge* 200 ff., where earlier opinions are discussed: P. M. Meyer, *Jur. Pap.* p. 41; L. Tripiccione, *op. cit.* (see note 5) 33 ff.; L. Wenger, *op. cit.* (see note 5) 66 ff.; V. Arangio-Ruiz, *op. cit.* (see note 2) 72 ff.; G. Petropoulos, *op. cit.* (see note 5) 124 ff.; St. G. Huwardas, *op. cit.* (see note 5) 46 ff.; W. F. Edgerton in *Papyri und Altertumswissenschaft* (see note 110) 291; C. B. Welles, *ibid.* 393; R. Taubenschlag, *op. cit.* (note 83) 269; E. Schönbauer, *op. cit.* (see note 5) 56 f.—After Wilcken, *UPZ.* I 580, pointed out that the *agraphos gamos* is not mentioned in the sources before the Roman period, it is no longer possible to bring *P. Par.* 13 into direct relation with the problem. But see p. 69.

[167] K. Sethe, *op. cit.* (see note 5), accepted by P. M. Meyer, *Jur. Pap.* p. 41; E. Levy, *Ehescheidung* (see note 136) 112; U. Wilcken, *UPZ.* I 580, and *P. Freib.* III p. 65.

conformity with the literal meaning of the word, an *unwritten* marriage.[168]

2. *Dura Perg.* 22 of A.D. 204, recently published by C. B. Welles,[169] shows that in the epoch of the principate [170] an *ἀγράφως συνεῖναι* was practiced in the eastern parts of the Empire also, and it becomes manifest from a comparison of this text with *PSI.* VIII 921.28 ff. (Fayûm, A.D. 143/4) [171] that the two institutions were substantially identical in fact as in name.

PSI. VIII 921.28 ff.

συνῆρθαι αὐτοὺς τὴν πρὸς ἀλλήλους συμβίωσιν [ἥ]τις αὐτοῖς συνειστήκει ἄγραφος κ[αὶ ἐξεῖ]ναι αὐτῶν τὰ καθ' ἑαυτὸν οἰκονομῖν ὡς ἐὰν αἱρῆται, [τῇ] δὲ Θερμουθαρίῳ καὶ ἑτέρῳ ἀνδρὶ ἑ[ξαῦτις συν]ορμάζοσθαι ἀσυχοφαντήτῳ οὔσῃ κατὰ πάντα τρόπον, καὶ μηδὲν ἀλλήλοις ἐνκαλεῖν περὶ μηδενὸ[ς τῶν εἰς τ]ὴν συμβ(ίωσιν) ἀνηκόντων μηδὲ μὴν περὶ ἄλλου μηδενὸς ἁπλῶ[ς] πράγ(ματος) μέχρι τῆς ἐνεστώση(ς) ἡμέρας.

Dura Perg. 22.9 ff.

φάμενοι γεγενῆσθαι αὐτοῖς τὸν συνοικυσμὸν ἔτι πρότερον ἀγράφως, τέκνα δὲ αὐτοῖς μὴ γένηται, δυσαρετὴς δὲ νυνὶ τὴν ἑαυτῶν συμβίουσιν, ἐξωμολογήσατο ἀφείσθασθαι ἀπὸ ἀλλήλων καὶ διδόναι ἀλλήλοις ἔφεσιν καὶ ἐξουσίαν, Ναβουσαμάος μὲν τῇ Ἀκοζζὶς συνοικεῖν ἑτέρῳ ἀνδρὶ ὃ ἂν αὐτὴ αἱρῆται, Ἀκοζζὶς δὲ τῷ Ναβουσαμάῳ γαμεῖν ἄλλην γυναῖκαν ὃ ἂν αὐτὸς βούληται, καὶ μὴ ἐνκαλεῖν μηδὲ ἐνκαλέσσειν ἀλλήλοις μήτε περὶ τοῦ συνοικισμοῦ μήτε πρὸς κληρονόμων αὐτῶν μήτε πρὸς ἄλλον

[168] Wenger's statements have been commonly accepted, see B. Kübler, *Ztschr. Sav. St. Rom. Abt.* L (1930), 622 f.; Arangio-Ruiz, *op. cit.* 75; Petropoulos, *op. cit.* 125; Huwardas, *op. cit.* 47; Welles, *op. cit.* (see note 393); Montevecchi, *Aegyptus* XVI (1936), 15. As early as in 1903 the same opinion had been expressed by R. De Ruggiero, *Bull. dell'Ist. di Dir. Rom.* XV (1903), 249, supported by B. Frese, *Aus dem gräko-ägyptischen Rechtsleben* (Halle 1909), 39.

[169] *Op. cit.* (note 166) 389 ff. Cf. *Dura Report* VI (1936), 431 f. The text was recently discussed by Smolka, *Eos* XXXVIII (1937), 449 ff. Since this article is written in Polish, I am unable to profit by it.

[170] For the Byzantine period see the fourth chapter.

[171] Cf. *P. Flor.* I 24 (Mitteis, *Chrest.* 187; Fayûm, A.D. second century). lines 6/7.

> *τινὰ τῶν ἐξ ὀνόματος αὐτῶν ἔνγραφον, ἐνγράφου ἐνστάντος ἢ γενομένη τῶν ἀπὸ τῶν ἀνωτέρων χρόνων.*

Therefore *συνεῖναι ἀγράφως* was a Greek custom.[172] Its Greek character is to be deduced not only from the agreement of two sources found in regions so distant from each other,[173] but even more from their differences which, without prejudice to their substantial similarity, are great enough to exclude any assumption that either law borrowed or derived from the other.

This is consistent with the fact that the citizens of Alexandria also practiced unwritten marriage (see pp. 40, 43). On the other hand, to claim unwritten unions for the Greek sphere does not of course exclude the idea that the Egyptian legal system might have known a similar institution. It is to be considered that Egyptologists like Junker, Edgerton, and others,[174] actually assert that the ancient Egyptian marriage could be contracted by mere cohabitation. Moreover, we shall find the existence of an Egyptian unwritten marriage as good as proved by *P. Oxy.* II 237 (see p. 62 ff.). In the Greco-Egyptian law of Roman times both Egyptian and Greek

[172] The dominant opinion more or less concurs in accepting the Egyptian origin of the institution. Formerly the unwritten marriage of the Greek papyri was simply identified with the Egyptian "alimentary marriage"; recently authors believe it to be a mixture of native and Greek elements. Cf. Mitteis and P. M. Meyer, *opp. citt.* (note 166); Partsch, *P. Freib.* III p. 19; Arangio-Ruiz, *op. cit.* 72. Any connection of the *agraphos gamos* with the alimentary marriage is denied by W. F. Edgerton, *Notes on Eg. Marr.* (see note 110) 25; E. Seidl, *Ztschr. Sav. St. Rom. Abt.* LII (1932), 452 f.; Huwardas, *op. cit.* 55 f.; M. San Nicolò, *Ztschr. Sav. St. Rom. Abt.* LIII (1933), 552, whereas Wenger, *op. cit.* 79, doubts it. Nevertheless most of them believe at least that the *agraphos gamos* grew up under Egyptian influence. This is doubted by Wenger and Edgerton (see also *Pap. u. Altertumswiss.* [note 110] 291), whereas Petropoulos believes the unwritten marriage to be the proper Greek-Roman form. Schönbauer, *op. cit.* (see note 5) 56, denies that it is a proper legal institution at all, either of the Egyptian, or the Greek, or the Roman law.

[173] See P. Koschaker's axiom which is quoted by E. Seidl, *Ztschr. Sav. St. Rom. Abt.* LII (1932), 553.

[174] See the quotations given in note 110.

elements are combined in the institution known from the papyri, and it will be precisely one of our tasks to separate, as far as possible, the respective national components.

II. From the papyrus to be quoted immediately it is evident that a marriage which existed *ἀγράφως* was regarded in fact as contrasting with marital relations based on some written contract. Was this a formal difference only, or did it affect in any substantial manner the relations which existed between the spouses?

1. As to personal relations, *συνεῖναι ἀγράφως* produces the full effects of a lawful marriage. Children are held to be legitimate,[175] and their right to inherit their mother's estate is asserted for them by their father.[176] As to the couple's, especially the wife's, obligation to be faithful, there cannot be any doubt that it is as strong as in a written marriage, considering *PSI.* VIII 921.28 ff. and *Dura Perg.* 22. Divorce is formulated in *PSI.* 921 in almost the same terms as in a document, only twenty years earlier, and from the same nome, which attests divorce of a couple married by a written agreement. *P. Lips.* 27.15 ff. (A.D. 123) reads:

συνῆρσθαι τὴν πρὸς ἀλλήλους [συν]βίωσιν ἥτις αὐτοῖς συνεστήκι ἀπὸ συνγραφῆς ὁμολ(ογίας)—[ἣν] καὶ ἀναδεδωκέν[α]ι .[...]εἰς ἀθέτησιν καὶ ἀκύρωσιν, Ἥρω[ν] δὲ ἀπέχιν παρὰ τοῦ Σωσᾶ τὰς διὰ τ[ῆ]ς συνγραφῆς φερνῆς [ἀ]ρ[γ]υρίου δραχμὰς—καὶ ἐξῖναι ἑκατ[έ]ρῳ [κατὰ] τὰ καθ[ήκον]τα οἰκονομῖν περὶ αὐτῶ[ν ὡ]ς ἐὰν ἐρῆται, τῇ δὲ Θε[νσ]τοτοήτι ἐξαῦτις [συν]-αρμόζ[εσθαι ᾧ] ἐὰν [βού]ληται ἀνδρεὶ ἀνε(?)φαπτ.τω[.....]....[..]α καὶ μὴ ἐπελεύσασθαι ἐ[π'] ἀλλήλους [περ]ὶ μ[η]τε[νὸ]ς τ[ῶν] τῇ συνβιώ[σι] ἀνηκ[ό]ν[τω]ν μηδενὸς ἀπαξαπλῶς [πρά]γματος μ[έ]χ[ρι] τῆ[ς] ἐνεστώσης ἡμέρας.[177]

[175] See *PSI.* VII 777, *P. Sammelb.* III 7239, *BGU.* IV. 1084. Huwardas, *op. cit.* 48.

[176] See *P. Sammelb.* III 6611 with P. M. Meyer, *Raccolta di scritti in onore di Giacomo Lumbroso* (Milan, "Aegyptus," 1925), 228; Huwardas, *op. cit.* 50.

[177] In the same manner we should understand, in my opinion, the more general clause of *BGU.* III 975 (Fayûm, A.D. 45): *καὶ μηδὲν ἀλλήλο[ι]ς ἐνκ[α]λεῖν μηδ' ἐνκαλέσειν περὶ μη[δε]νὸς ἀπ[λῶς πράγ]ματος* (cf. *CPR.* 23 [Mitteis, *Chrest.*

2. Κοινῇ κυριεύειν with its consequences, that is, chiefly the requirement of consent of the other party for disposal of property, seems to have been an effect of the unwritten marriage also. It is in this way that we must understand the words of *PSI.* VIII 921 : ἐξεῖναι αὐτῶν τὰ καθ' ἑαυτὸν οἰκονομεῖν ὡς ἐὰν αἱρῆται, if they are not an empty phrase. This agrees with the fact that provisions about κοινῇ κυριεύειν never occur in marriage contracts of the imperial period, except *P. Oxy.* II 265.[178] We may conclude that it was an *ipso iure* consequence of every marriage.

3. *Dura Perg.* 22 makes no mention of joint property of the pair, but the positive statement that there are no children makes it appear probable that here also the ἀγράφως συνεῖναι produced some legal restriction of property rights.

4. Huwardas [179] finds a characteristic of the ἄγραφος γάμος in the lack of a κατοχή either of the wife in her husband's, or of the children in their parents', property.[180] The joint ownership which is the basis of this right is, in his opinion,[181] limited to the "full" marriage, and he accordingly considers the un-

294; Fayûm, time of Antoninus Pius] and *P. Oxy.* VI 906 [second or early third century]). The instrument is drafted in a manner very similar to that of *P. Lips.* 27.

[178] In *P. Oxy.* III 497, *PSI.* V 450, and *P. Oxy.* III 603 descr. (published by C. Wessely, *Stud. Pal.* IV [1905] 115), the man promises not to dispose of property without the consent of his wife. But at least in *PSI.* V 450 and *P. Oxy.* III 603 this prohibition seems to refer to special objects only (cf. the editor's note on *PSI.* V 450.17).—*PSI.* I 36a.18 ff. seems to refer to a joint inheritance.

[179] *Op. cit.* 53 ff.

[180] About the actual meaning of *katoche* most recently H. Kreller, *Aegyptus* XIII (1933), 261 ff. (quotations *ibid.* 261[1]).—*Katoche* was the Greek name of an Egyptian institution, Huwardas, *op. cit.* 34. Could it be, in so far as it means the wife's right, the transfer of the husband's property to her, which, according to E. Seidl (see note 117), occurs in Demotic contracts? If Petropoulos, Κοινοκτημοσύνη 59, is right in asserting that *katoche* and *kratesis* only mean a right of the married woman to consent to the dispositions of her husband, any practical difference as to this matter between the Greek and the Egyptian law would disappear in practice. The question cannot be dealt with here. As a matter of fact, Petropoulos' interpretation conflicts, in my opinion, with *BGU.* IV 1148.

[181] *Op. cit.* 34 ff.

written marriage to be a marriage of minor effect in some respects.[182] I cannot accept his conclusions.

a. A *κατοχή* in favor of children, established by the marriage contract of their parents, is known from *P. Oxy.* IV 713 (Mitteis, *Chrest.* 314; A.D. 97).[183] Instances of marriage agreements containing dispositions of this kind[184] seem to be *P. Oxy.* II 265,[185] *CPR.* 28 (Mitteis, *Chrest.* 312; Fayûm, A.D. 110), and perhaps *PSI.* V 450, where contractants stipulate rules to govern the succession to their property in case either dies. As to *CPR.* 28, there is no full evidence. In view, however, of the immediate effectiveness of a similar provision made by grandparents in favor of their grandchildren in *P. Strassb. Gr. inv.* 87 recto,[186] we may assume, in my opinion, that the probable revocability of these dispositions[187] meant only the right to make another distribution,[188] but did not prejudice the protection which the *katoche* procured for the descendants against alienations *inter vivos*.[189, 190]

These instances, however, do not prove Huwardas' suggestion. It is true that provisions like these had to be made in public deeds (edict of M. Mettius Rufus, *P. Oxy.* II 237 col. VIII [Mitteis, *Chrest.* 192; P. M. Meyer, *Jur. Pap.* no. 59], line 35), which might of course be marriage contracts. But on the one hand, provisions of this kind do not occur in every marriage agreement drafted as a public instrument, and on the other, there are various instances to show that the enforcement of such conditions did not depend

[182] *Op. cit.* 55.

[183] For the effects of this contract: cf. Mitteis, *Grundzüge* 243; H. Kreller, *Erbrechtl. Untersuch.* (see note 26), 185, but also *Aegyptus* XIII (1933), 262.

[184] Cf. Huwardas, *op. cit.* 42 f.—For *P. Giess.* 30 see Kreller, *Erbrechtl. Untersuch.* 187 f., and Huwardas, *op. cit.* 45.

[185] Kreller, *op. cit.* 230.

[186] *Ed.* U. Wilcken, *Arch. f. Papyr.* IV 130 ff. Cf. Kreller, *op. cit.* 184^{10}, 236.

[187] Kreller, *op. cit.* 234, 244 f.

[188] About the right of succession of descendants Kreller, *op. cit.* 194, 197.

[189] If I understand him, Kreller is now of the same opinion; see *Aegyptus* XIII (1933), 262.

[190] *P. Oxy.* III 496 and 497, quoted by Huwardas, *op. cit.* 42^{5}, do not belong to this group. The man, and perhaps the wife also, reserves the full right to any future disposition (Kreller, *Erbrechtl. Untersuch.* 234 f.). That does not conform with a *katoche* in favor of the children. Another instance of a *katoche* is *P. Mich.* II 121 recto II 2.1, but this text, as a *συγγραφὴ τροφῖτις*, does not belong to our sources, because it refers to Egyptian law.

necessarily on their inclusion in a *marriage* contract; note for example *P. Teb.* II 381.[191] Moreover, it seems to be provable that they could be made even by people living in an unwritten union. *BGU.* I 86 (Mitteis, *Chrest.* 306; Fayûm, A.D. 155) is a parental division like the second part of *CPR.* 28. It reads in line 5: *συνχωρῶ μετὰ τὴν ἑαυτοῦ τελευτὴν τοῖς γεγονόσι α[ὐτ]ῷ ἐκ τῆς συνούσης αὐτοῦ γυναικός.* I believe this indicates a case of *ἀγράφως συνεῖναι.* When the basis of the marriage was a written instrument, this fact seems usually to have been stated, see *BGU.* VI 1285; *P. Oxy.* VII 1034.[192, 192a]

Last but not least, contrary to Huwardas' opinion,[193] as to Dionysia's *katoche*, the form of marriage, whether in her case or her parents', was of no concern in the famous lawsuit of Dionysia versus her father Chairemon which is known from *P. Oxy.* II 237.

From a detailed analysis of this petition it becomes clear that it does not deal immediately with the *katoche* to which Dionysia was entitled in certain property left[194] by her mother, which had been given to her husband as a *προσφορά* in such a way[195] that possession and revenues were reserved to Chairemon, while he had to support Dionysia. As a matter of fact, annulment of the *katoche* encumbrance had been the subject of a former lawsuit referred to by Chairemon's petition of Pachon 27, 25th year (A.D. 185), which is mentioned by Dionysia in a parenthesis included in the copy of her father's application of Pachon, 26th year (col. VI 15 f.); cf. also col. VII 11: *ἤδη ποτὲ ἐπειόντα μοι π ρ ό τ ε ρ ο ν μὲν ὡς ἀνόμου κατοχῆς χάριν.* The mode of procedure can be gathered from col. VI 8–11, together with col. VI 38 ff., apparently referring to the same proceedings. Upon application made by both Chairemon and Dionysia, the prefect Longaeus Rufus had ordered an investigation to be made by the *strategos*. This official received information from the *bibliophylakes* and sent it to the present prefect Pomponius Faustianus,[196] including it in a report.

[191] See Kreller, *op. cit.* 219.

[192] Kreller, *op. cit.* 220 f.

[192a] As to *P. Grenf.* I 21.4: *ἣι συνήμην γυναικὶ κατὰ νόμους* see note 96. In *BGU.* I 232 the same expression seems to indicate, more concretely, an *ἀγράφως συνεῖναι*; see note 238.

[193] *Op. cit.* 54.

[194] O. Gradenwitz, *Arch. f. Papyr.* I 331.

[195] This is the general opinion: Grenfell-Hunt, edition p. 143; Mitteis, *Arch. f. Papyr.* I 179; Kreller, *op. cit.* 183; Huwardas, *op. cit.* 38. In a similar way *CPR.* 24.

[196] Cf. Grenfell-Hunt, *op. cit.* 164 (note to col. V 5).

Upon a new application by Dionysia, the prefect gave an order; and thereupon some instruction (ἐπίσταλμα, col. VI 11) was given to the *bibliophylakes*. Chairemon had proved unsuccessful, col. VI 25.: τοῦ ἀνδρός με στερῆσαι ἐπιχειρῶν, ἐπ<ε>ὶ μὴ δύναται τῆς οὐσίας. Hence he tried another way, that is, to separate his daughter and her husband.[196a] This was the purpose of his application of Pachon, 26th year (col. VI 12 ff.). Formally this application was possible because his case was not prejudiced by any decrees pronounced against him that dealt positively with this point; col. VII 4 ff.:

ἐπεὶ δὲ ὁ Χ[αιρ]ήμων δι' ἧς καὶ νῦν πεπο[ίη]ται παρὰ τῷ [λ]αμπροτάτῳ ἡγεμόνι ἐντυχίας ἠξίωσεν τὴν θυγατέραν ἄκ[ου]σαν ἀποσπᾶν οὐδὲ π[ερ]ὶ τούτου οὔτ[ε δι]ὰ τῆς τοῦ δια[σ]ημοτάτου Ῥούφου οὔτε διὰ τῆς τοῦ λαμπ[ρο]τάτου ἡγεμόνος Πομπωνίου Φα[υσ]τ[ι]ανοῦ ἐπιστολῆς ὁρᾶτα<ι> ῥητῶς κεκ[ελ]ευσμένον, δύναται περὶ τούτου ἐντευχθῆναι ὁ λαμπρότατος ἡγεμών.

Moreover, Chairemon did not pay the χορηγίαι he owed to Dionysia, col. VI 27. To these two points Dionysia refers in her petition. The *katoche* is concerned indirectly only in so far as Chairemon's obligation to pay the support was dependent upon its validity.

It is not surprising,[197] therefore, that Dionysia does not allege anything about the form of the marriages either of her parents or of herself to support her claim that the *katoche* should be upheld. We need not content ourselves with this negative argument, however, since the papyrus affords evidence for the real reason why Chairemon demanded the cancellation of the encumbrance. In his application of the 26th year he says (col. VI 12 ff.):

τῆς θυγατρός μου Διονυσίας, ἡγεμὼν κύριε, πολλὰ εἰς ἐμὲ ἀσεβῶς καὶ παρανόμως πραξάσης κατὰ γνώμην Ὡρίωνος Ἀπίωνος ἀνδρὸς αὐτῆς, ἀνέδωκα ἐπιστολὴν Λογγαίῳ Ῥούφῳ τῷ λαμπροτάτῳ, ἀξιῶν τότε ἃ προσήνεγκα αὐτῇ ἀνακομίσασθαι κατὰ τοὺς νόμους, οἰόμενος ἐκ τού-<του> παύσασθαι αὐτὴν τῶν εἰς ἐμὲ ὕβρεων.

That means: Chairemon cites his daughter's ingratitude as a reason for revoking the *prosphora* and for obtaining simultaneously cancellation of the *parathesis* of the *katoche*. We do not learn why his demand was rejected. Probably the particulars he could pro-

[196a] Cf. L. Wenger, *Actes du V^e Congrès de Papyrologie* (Brussels, Musées Royaux d'Art et d'Histoire, 1938) 551.

[197] See Huwardas, *op. cit.* 54.

duce were not admitted as a sufficient basis for his claim. At any rate, in contrast with the Roman law of the classic period, the revocation itself seems not to have been precluded as such (*κατὰ τοὺς νόμους*),[198] and, as a matter of fact, Dionysia does not fail to declare once again that her father's charges are insubstantial, col. VI 20 ff.:

οὐδεμίαν μὲν οὔτε ὕβριν οὔτε ἄλλο ἀδίκημα εἰς αὐτὸν ἁπλῶς ἐφ' ᾧ μέμφεται δεῖξαι ἔχων, ἐπὶ φθόνῳ δὲ μόνον [λο]ιδορούμενος καὶ δεινὰ πάσχων ἀπ' ἐμοῦ, λέγων ὅτι δὴ ὦτα παρέχω ἄνοα αὐτῷ.[199]

b. For the provisions of the law with regard to *katochai* of married women, our source material does not afford full evidence. It is true

[198] Thus the right to revoke a gift for ingratitude, only gradually acknowledged by the Roman law from Diocletian onwards (*Cod. Theod.* 8.13.2: *avi nostri*), apparently had been anticipated in provincial laws. Cf. in regard to other institutions Wenger, *op. cit.* (see note 196a) 551. The mother who in the case, approximately contemporary to *P. Oxy.* II 237, of Papinian *Dig.* 39.5.31.1 (*Fr. Vat.* 254) wants to take back the *species extra dotem . . . filiae nomine viro traditae* for the reason that she had been offended by daughter or son-in-law, apparently relies on a provincial rule, as does Chairemon. Papinian did not concede her this right for the simple reason that she had lost her title by the gift. Only the interpolation at the end of *Dig.* 39.5.31.1 deals with the arguments of the mother. Cf. F. Schulz, *Einführung in das Studium der Digesten* (Tübingen, Mohr, 1916), 69. About the interpolation, which is almost generally admitted, see *Index Interpolationum* III (Weimar, Boehlau, 1935), *ad loc.* Generally about revocability of gifts: P. Cuq, *Manuel des institutions juridiques des Romains*[2] (Paris, Plon, 1928), 533; P. F. Girard-F. Senn, *Manuel élémentaire du droit romain*[8] (Paris, Rousseau, 1929), 1003[4]; W. W. Buckland, *A Textbook of Roman Law from Augustus to Justinian*[2] (Cambridge, Univ. Press, 1932), 254. Here the problem cannot be dealt with in detail. The inferior position of the mother in comparison with that of the father (see especially *Cod. Theod.* 8.13.1,2) is due, in my opinion, to the postclassic desire to reserve the maternal estate for the descendants.

[199] The fact that the *strategos* asks the *βιβλιοφύλακες* for information does not conflict with our interpretation. The *strategos* had only to prepare the decision of the prefect, and to submit to him all the facts which concerned the matter, but it was not his duty to decide whether or not they were important (cf. Mitteis, *Grundzüge* 40). A different question is whether the father, provided he could revoke the *prosphora* for ingratitude, also could annul the *katoche* that Dionysia had in the goods left by her mother; for the latter probably was founded rather on a former agreement of her parents than on the *prosphora* made in her own marriage contract. But we need not deal with this question because in any case Chairemon's claim was rejected with regard to the *prosphora* also.

that the prefect Sulpicius Similis in his edict quoted in *P. Oxy.* II 237 col. VIII 21 ff. only considers *katochai* of Egyptian women which had been arranged *διὰ τῶν γαμικῶν συγγραφῶν*, and that in *BGU.* IV 1148.16 f. the *katoche* referred to was based on a *συγγραφὴ Αἰγυπτία*. But M. Mettius Rufus' edict about the *βιβλιοθήκη ἐγκτήσεων* distinguishes the right to *κρατεῖν τὰ ὑπάρχοντα* (*scil. τῶν ἀνδρῶν*) on the part of women *κατά τινα ἐπιχώριον νόμον* from the right of children *οἷς ἡ μὲν χρῆσεις διὰ δημοσίων τετήρηται χρηματισμῶν*. It is suggested that this distinction was not made without reason. Furthermore, the indefinite expression: *κατά τινα ἐπιχώριον νόμον* makes it necessary to assume that several statutes dealt with the subject; for it is unbelievable that an edict of an imperial prefect could be drafted in so indefinite a manner if there was only one statutory rule concerning it. We have to reckon, consequently, with several ways in which the interest might arise. It is useless to make conjectures. It is possible that some written instrument was necessary.[200] But it is practically certain that this was not the only condition, in case it was one, and it is probable that the other conditions must be sought outside the sphere of the marriage law. Considering the fact that none of the Greek marriage contracts of Roman times shows any feature interpretable as an agreement about a *katoche*, we have to conclude that under no conditions can the *katoche* of married women be regarded as specially characteristic of a marriage based upon an instrument; and consequently, neither can its non-existence be considered a characteristic of unwritten unions.

c. It is striking that we find marriage contracts drawn up by persons who have lived together for years, and which seem to have no other object than to include parental divisions either of the pair or of parents of one of them: *CPR.* 28; *BGU.* I 251, 183, 252,[201] but this does not disturb our conclusion. *BGU.* I 86 and *P. Teb.* II 381 show that settlements of the same kind could also be made apart from marriage contracts. The custom of including them in marriage agreements must have been so well established that sometimes contractants could not imagine their being arranged otherwise.[202] When a child left the parental household to establish one of his or her own, a division of the family property suggested itself,

[200] Cf. Mitteis, *Grundzüge* 96[2].

[201] Cf. Kreller, *Erbrechtl. Untersuch.* 184[10], 233[46], who justly considers the relative smallness of the dowries given in these cases.

[202] Cf. E. Rabel, *Elterliche Teilung* (in *Festschrift zur 49. Versammlung deutscher Philologen und Schulmänner*, Basel, 1907), 536[2]; Kreller, *op. cit.* 224. *Cod. Just.* 2.3.15 (A.D. 259).

but it was not only the division that was embodied in a written act, but the whole arrangement as well, that is, the marriage. *BGU.* I 183, 251,[203] 252 are analogous to arrangements of this kind.[204]

5. The marriage instruments of the imperial epoch agree perfectly with the conclusion reached in the foregoing inquiry. This becomes evident especially in the so-called conversions of ἄγραφοι γάμοι into written marriages. There is a series of documents of the first and second centuries in which couples who had already united years before establish a written basis for their union.[205] That the prior union was *agraphos* is stated in *BGU.* IV 1045 only; but the analogy of this text, and the fact that no written basis of the original union [206] is ever mentioned make it probable that this was the case in the other instances as well.[207]

It has already been remarked by some writers [208] that it is not accurate to speak here of a conversion of the marriage itself into another form. The clauses that concern the personal relationships of the marriage expressly refer to the state of things already existing. It is unthinkable that from this

[203] Huwardas' interpretation of these texts, *op. cit.* 41, is arbitrary.

[204] Mitteis, *Grundzüge* 244, considers that the contractants wanted to avoid the more complicated formalities of wills. This may also have been a factor. Furthermore, all of the three texts are from the Fayûm, and near each other in time, two of them coming from the same family. We have to reckon, therefore, with a local and temporary peculiarity.

[205] *PSI.* I 36a (Fayûm, 11/19 A.D.); *P. Ryl.* II 154 (Fayûm, A.D. 66); *BGU.* I 251, 183 (Mitteis, *Chrest.* 313), 252 (Fayûm, A.D. 81, 85, 98 *resp.*); *P. Oxy.* II 265 (time of Domitian); *BGU.* I 232 (Fayûm, A.D. 108; cf. note 238); *CPR.* 28 (Mitteis, *Chrest.* 312; Fayûm, A.D. 110); *BGU.* IV 1045 (Mitteis, *Chrest.* 282; Fayûm, A.D. 154); *PSI.* V 450 recto col. I (Oxyrhynchos, second century). *CPR.* 24 (Mitteis, *Chrest.* 288) does not belong to this group, see Mitteis, *op. cit.*, introduction to the text; Arangio-Ruiz, *op. cit.* 74[3]); neither *P. Teb.* II 386 (Mitteis, *Chrest.* 298; A.D. 12) which is included by most of the scholars, but see Wenger, *op. cit.* (see note 5) 71. *P. Oxy.* VI 903 does not bear on our question either; see Wenger, *op. cit.* 72.

[206] Justly emphasized by Arangio-Ruiz, *op. cit.* 75.

[207] That is the almost universal opinion: Mitteis, *Grundzüge* 201 f.; P. M. Meyer, *Jur. Pap.* p. 50; Arangio-Ruiz, *op. cit.* 74 f.; Petropoulos, *Acad. Athens* VI (1931), 125[1]; Huwardas, *op. cit.* 54[2]. Wenger, *op. cit.* 71 f., is not convinced.

[208] L. Tripiccione, *op. cit.* (see note 5) 40 ff.; Petropoulos, *op. cit.* 125[1].

brief clause, placed, moreover, between the dowry receipt (drafted in the form of a homologia) and provisions for the possible return of the *pherne*, there could result a transformation of the actual character of the marriage.[209] The main purpose of documents like these is not that of establishing another form of marriage, but of arranging the relations of husband and wife with regard to property concerns.

Why did the parties believe it to be necessary to make a written contract after years [210] of unwritten union? In view of the fact that *BGU.* IV 1045 afforded evidence that a dowry could also be connected with an unwritten marriage,[211] it is not permissible to seek the reason in a simple desire to document the existence of a *pherne*, and to provide for its restitution in addition to other property matters.[212] I think that the papyri, although never positively telling the reason, suggest another answer. As a matter of fact, in all of the documents referring to the subject there are special provisions which needed a proper contract. There are stipulations about the period allowed for payment in case of return of the dowry, about the *praxis*, about a *prosphora*, and so on. In *P. Ryl.* II 154 the father of the contracting woman participates in the agreement. This contract and *P. Oxy.* II 265 in particular contain extensive and complicated arrangements. In other texts we meet with testamentary dispositions or divisions either on the part of the couple or of other persons. And we get the same impression from the written acts [213] drawn up

[209] This also against Mitteis' hypothesis, *Grundzüge* 205, that the element distinguishing *gamos engraphos* and *gamos agraphos* is the existence, or not, of an agreement about the personal effects of the marriage.

[210] Arangio-Ruiz, *op. cit.* 74.

[211] Cf. also *P. Flor.* 24.6/7 (Mitteis, *Chrest.* 187) with Mitteis' plausible restoration. Also in *PSI.* V 450 the husband says in his *hypographe* (line 17): *πρόεσχον*. *PSI.* VIII 921.28 ff. does not mention the dowry, but it is a *diagraphe* like *P. Flor.* 24. Cf. Huwardas, *op. cit.* 48.

[212] So Arangio-Ruiz, *op. cit.* 74, 83.

[213] *P. Mich.* II 121 recto IV 1 (Fayûm, A.D. 42); *CPR.* 236 (Fayûm, time of Domitian); *CPR.* 24 (Mitteis, *Chrest.* 288; Fayûm, A.D. 136); *CPR.* 238 (Fayûm, second century); *PSI.* X 1115, 1116, 1117 (Fayûm, A.D. 153,

on the occasion when the marriage was contracted.[214] There also are always some details included that are not mere legal consequences of the marriage or the establishment of the dowry. *PSI.* x 1116 attracts attention because its contracting parties are the mothers of both bride and bridegroom. A contract especially interesting for its irregular contents is *P. Oxy.* XII 1473.

No certain answer can be given to the other question, why it was, apparently, usual to draft arrangements like these in the form of complete marriage contracts, even in cases where the marriage already existed. It may be that contractants wanted to exclude doubts as to the *causa.* But perhaps it was simply a stereotyped formula.[215]

III. The only features of the *agraphos gamos* that can certainly be determined are the well-known facts testified to by *CPR.* 18 (Mitteis, *Chrest.* 84; P. M. Meyer, *Jur. Pap.* no. 89; Fayûm, A.D. 124) and *P. Oxy.* II 237; that is, the lack of *testamenti factio activa* during his father's lifetime[216] of a son born in an *agraphos gamos*, and the father's right to divorce his daughter, born in an *agraphos gamos*, from her husband, even

second century, *resp.*); *CPR.* 22 (republished as *Stud. Pal.* XX 7; time of Antoninus Pius); *CPR.* 27 (Mitteis, *Chrest.* 289; republished as *Stud. Pal.* XX 15; Fayûm, A.D. 190); *P. Oxy.* XII 1473 (A.D. 200/1); *CPR.* 21 (republished as *Stud. Pal.* XX 31; Fayûm, A.D. 230). Undeterminable: *P. Oxy.* II 371, III 603–07, IV 795, *CPR.* 235, *P. Teb.* II 456, 514, *P. Ryl.* II 262.

[214] I omit here the contracts with *ekdosis.* Cf. p. 68.

[215] Was it possible to draw up agreements about the dowry without stipulating simultaneously, at least briefly and in general terms, rules to govern the marriage itself? The ἀσφάλεια mentioned in *BGU.* III 970.15 (Mitteis, *Chrest.* 242; Fayûm, A.D. 177) was not a *syngraphe*, but a *cheirographon* (line 21; cf. Huwardas, *op. cit.* 36^4), and so, perhaps, concerned the dowry only. But we have to take into consideration that in *BGU.* III 717, also a *cheirographon*, the husband promises good treatment of his wife. In *PSI.* VIII 904 (Fayûm, A.D. 47) a husband accepts from his father-in-law some land ἐν προσδώσει to his *pherne.* The text does not mention the marriage itself, but its poor state of preservation prevents positive conclusions (was the *prosdosis* really a *prosphora*, as Huwardas, *op. cit.* 38^3, thinks? I am not convinced).—Cf. also *P. Sammelb.* I 5167.

[216] Kreller, *op. cit.* 167 f.

against her own inclination. Evidently they are, contrary to the opinion of Arangio-Ruiz,[217] derived from Egyptian law.[218]

According to *CPR.* 18, as well as *P. Oxy.* II 237 (col. VII 33, 40), the father's rights positively resulted from *τῶν Αἰγυπτίων νόμος*. I am unable to agree with Arangio-Ruiz,[219] who regards this "Statute of the Egyptians" as a collection of principles used by the Roman officials in native lawsuits, similar to the *Gnomon of the Idios Logos*. It is unthinkable that high Roman officials should have opposed in so definite a manner a maxim of their own or of their predecessors as they did in the precedents presented by Dionysia. It is also unlikely that a peregrine advocate would have dared to denounce the "inhumanity" of this *nomos* before a Roman officer (*P. Oxy.* II 237 col. VII 35), if it had emanated from the Roman government itself.

This is confirmed by a thorough analysis of the documents. Huwardas is right in rejecting Arangio-Ruiz' opinion [220] that the decision given in *CPR.* 18 is based merely on Roman principles. We can add to this [221] the argument that there could not have been a difference between a son born in a written marriage and one born in an unwritten marriage if the *iudex pedaneus* had merely relied on the Roman maxim that a *filius familias* is unable to own property and to draw up a will.

The real difference between the rules of the *nomos*, on the one hand, and the Roman law, on the other, becomes even more evident from the arguments used in A.D. 138 by the Roman *nomikos* Ulpius Dionysodorus to avoid the undesirable effects of this statute. He says (*P. Oxy.* II 237 col. VIII 3–6):

[217] *Op. cit.* 77 ff.

[218] Cf. Wenger, *op. cit.* (see note 5) 75; Huwardas, *op. cit.* 51, 53; Wenger, *op. cit.* (see note 196a) 551.

[219] *Op. cit.* 82. Undecided, Huwardas, *op. cit.* 53. Montevecchi, *Aegyptus* XVI (1936), 14 has doubts about Arangio-Ruiz' opinion. See also E. Bickermann, *Arch. f. Papyr.* IX 40 f.

[220] *Op. cit.* 80.

[221] *Op. cit.* 51.

Δ[ιον]υσία ὑπὸ τοῦ πατρὸς ἐκδοθεῖσα [πρ]ὸς γάμον ἐν τῇ τοῦ π[α]τρὸς ἐξουσ[ίᾳ οὐ]κέτι γείνεται. καὶ γὰρ εἰ ἡ μήτηρ αὐτῆς τῷ πατρὶ ἀγράφως συνῴκησε [κ]αὶ διὰ τοῦτο αὐτὴ δοκεῖ ἐξ ἀγράφων γάμων γεγενῆσθαι, τῷ ὑπὸ τοῦ πατρὸς αὐτὴν ἐκδόσθαι πρὸς γάμον οὐκέτι ἐξ ἀγράφων γάμων ἐστίν.

Dionysodorus considers that the father of this Dionysia—who is not the petitioner of *P. Oxy.* II 237—had lost his paternal power over her by giving her in marriage through *ekdosis*, and, as Huwardas has well observed,[222] deduces from this the fiction that, as far as the status of Dionysia is concerned, the marriage of her *parents* is no longer unwritten.[223] It is precisely this fiction, arbitrary and inconclusive, that shows that the reasoning of Dionysodorus was not that of the τῶν Αἰγυπτίων νόμος. The latter apparently granted to a father without any exception [224] the right to divorce a daughter, born in an unwritten marriage, from her husband; and actually both in the case of Ulpius Dionysodorus, as well as in that decided by the prefect Flavius Titianus in A.D. 128 (*P. Oxy.* II 237 col. VII 19 ff.), the father had claimed the right despite the circumstance that an *ekdosis* had been performed (see line 28 f.). In contrast with this, the Roman jurist relies on a *Roman* idea, that of *patria potestas*, to make it possible to protect a satisfactory union from paternal despotism, and so presses upon the Egyptian law a result desirable according to principles preferred by the Roman government.[225] But it is only in this way that we may speak of an appeal to principles of the Roman law. We are not entitled to suppose, as does Arangio-Ruiz,[226] a substantial identity of the *agraphos gamos*,

[222] *Op. cit.* 52.

[223] Erroneously Wenger, *op. cit.* 76.

[224] Cf. Huwardas, *op. cit.* 52.

[225] Cf. Arangio-Ruiz, *op. cit.* 78 ff., with reference to *Dig.* 24.1.32.19, 43.30.1.5, Paul. *sent.* 2.19.2, 5.6.15, *Cod. Just.* 5.17.5. It must not be disregarded, however, that these decisions, the earliest of them given by Antoninus Pius, are several decades later than those quoted in *P. Oxy.* II 237. See Wenger, *op. cit.* (note 196a) 551 ff. Cf. also what is said a bit later in the text.

[226] *Op. cit.* 72.

technically spoken of in the meaning of the statute, and the Roman marriage without *manus*. The Italian scholar's hypothesis is due to a disregard [227] of the fact that the decisions of the Roman officials, quoted in *P. Oxy.* II 237, are not based, as were several passages of the Roman sources [228] that are only seemingly parallel, on the idea that the *patria potestas* of the father, intact because the daughter lived in a marriage without *manus*, was not admissible as an argument that he might separate her from her husband against her own inclination. The Roman jurisconsult strongly emphasizes the fact that an *ekdosis* had been performed. The *ekdosis* could only be compared with the *coemptio*, that is, the transaction to convey the *manus* to the husband, and actually Dionysodorus made the comparison, as is shown by his conclusion: ἐν τῇ τοῦ π[α]τρὸς ἐξουσ[ίᾳ οὐ]κέτι γείνεται. The real problem, however, of the case depended, not on an *agraphos gamos* of the daughter, but on that of her parents. The weakness of his arguments demonstrates that, in bringing up the question of *patria potestas*, he shifted the problem to a point originally alien to it.[229]

Since we cannot, consequently, accept Arangio-Ruiz' suggestion that the facts mentioned followed from Roman principles, practiced and codified by Roman officials, the inference that the τῶν Αἰγυπτίων νόμος contained native Egyptian law cannot be disallowed. The conclusion seems to me the more sure because it is unthinkable, in my opinion,[230] that a codification of this kind, that is, containing provincial law, but intended for use in Roman courts, was made under Roman government. Hence the statute necessarily dates from pre-Roman times; therefore any thought that Greek law was codified in it is

[227] The same is to be said of Huwardas, *op. cit.* 53.

[228] See note 225.

[229] The interpretation given by Petropoulos, *op. cit.* 128 ff., is due to his erroneous assumption that the *engraphos gamos* was the Egyptian marriage in contrast with the unwritten Greco-Roman marriage, and that it was, therefore, precisely the Egyptian law that disallowed the divorce of the daughter. Huwardas, *op. cit.* 53[3] rightly rejects his opinion.

[230] Differently Huwardas, *op. cit.* 57[4].

excluded, because indiscriminate subsumption of both Greeks and natives under the common name of "Egyptians" was out of the question before the Romans ruled the country. Our inference is backed by *BGU.* IV 1148, which hints at another rule of statutory law, which also relates to marital matters, which is beyond doubt both pre-Roman and Egyptian. I think with Mitteis[231] that there was at some time under the Ptolemies a codification of Egyptian law which included, among other subjects, rules dealing with marriage. Its Ptolemaic origin is evident from the fact that it was written in Greek.[232]

It is true that *τῶν Αἰγυπτίων νόμος* was applied to people of Greek nationality in *CPR.* 18,[233] as well as in some of the cases of *P. Oxy.* II 237. The petitioner, Dionysia, is herself a Greek, and her father is a former gymnasiarch, col. VI 12.[234] But this does not conflict with our previous assumption. Under the Roman government the *nomos* apparently was a part of the common law of the Chora which was applied to all inhabitants alike, except those belonging to the privileged classes of Romans and citizens of the Greek *poleis*.[235] It is precisely *P. Oxy.* II 237 that shows the extent to which Greek and Egyptian elements had fused in one Greco-Egyptian common law; we find the Greek institution of *ekdosis* in closest connection with the application of rules of native origin.

To elucidate the reasons that created the special conditions

[231] *Grundzüge* p. XIV. Cf. also Th. Mommsen, *Juristische Schriften* I 455, II 144 f.; Schubart, *Einführung in die Papyruskunde* 277; P. M. Meyer, *Jur. Pap.* p. 264, note on *P. Teb.* I 5.217; E. Seidl, *Ztschr. Sav. St. Rom. Abt.* LII (1932), 425.

[232] Mitteis, *Grundzüge* p. XIV.

[233] Wenger, *op. cit.* 75.

[234] Cf. Huwardas, *op. cit.* 56^2.

[235] Cf. E. Bickermann, *Arch. f. Papyr.* IX 40. As far as private law is concerned, I do not agree with E. Schönbauer's (*Ztschr. Sav. St. Rom. Abt.* XLIX [1929], 396^3) opposition to Bickermann; and I think that Schönbauer's own statements, *op. cit.* 401 ff., conform to the hypothesis suggested above. Equality of Egyptians and Enchoric Greeks as to private law does not exclude better conditions for the latter as to public law. Cf. also Arangio-Ruiz, *op. cit.* 30 ff., and especially 42 f.

of the *agraphos gamos* and to determine the characteristics of both *engraphos gamos* and *agraphos gamos* in their exact meaning according to the Egyptian law, is an Egyptological problem. Here we may content ourselves with the following statements. It is difficult to think that the mere drawing up of a contract like those considered on pp. 59 f. could bring about so definite a change of the legal status of the children as is testified to by *CPR.* 18 and *P. Oxy.* II 237, more especially since the purpose of these contracts was only to stipulate provisions or rights, especially of third persons, which could not be enforced without a proper agreement. Nor can the *ekdosis* be regarded as an essential of the *engraphos gamos* of the Egyptian law. This is excluded by the simple fact that the *ekdosis* was a Greek custom. Only a hint at the direction in which a solution of the problem should be sought may perhaps be found in the fact that the petitioner, Dionysia, in declaring (col. VII 12 f.) that there is no statute granting to a father the right to divorce his unwilling daughter from her husband, at least in respect to *αἱ ἐξ ἐγγράφων γάμων γεγενημέναι καὶ ἐνγράφως γεγαμημέναι*, seems to refer to the opinion of Ulpius Dionysodorus, and so to consider the *engraphos gamos* equivalent to a marriage contracted by *ekdosis*. But we should not fail to note that this analogy does not in any way help us to discover the secret of *CPR.* 18 and *P. Oxy.* II 237. So I cannot avoid the suspicion that it does not get to the core of the question.[236]

[236] It should not be forgotten that both *engraphos* and *agraphos* are *Greek* terms, and that consequently the Egyptian institutions referred to must correspond in some way to the Greek meaning of these words, that is, to "written" and "unwritten." Consequently, if what we suggested in the text be true, that is, that the arrangements cited could not prevent the marriage being *agraphos* according to the *τῶν Αἰγυπτίων νόμος*, the characteristic element of the Egyptian *engraphos gamos* must consist in some special written arrangements concerning the *marriage itself*. With Edgerton's conclusion (*Notes on Eg. marr.* [see note 110] 25, see also *Papyri und Altertumswissenschaft* [see note 110] 291; approved by E. Seidl, *Ztschr. Sav. St. Rom. Abt.* LII [1932], 435) I can agree only in so far as concerns the expressions themselves. As a matter of fact, his own sub-

IV. By ascribing to the Egyptian law the peculiarities dealt with above, we pave the way for determining the import of the unwritten marriage within the sphere of the Greek law. Our texts speak of *ἀγράφως συνεῖναι*, but there is no papyrological source that gives *agraphos gamos* as a technical term of Greek law,[236a] and only one—not certainly deciphered, moreover—which has *engraphos gamos*, namely, *P. Flor.* III 382.82 (= *P. Flor.* I 57; Wilcken, *Chrest.* 143). As we saw before (p. 44), this probably means an Alexandrian marriage contracted before the *hierothytai*. I suggest that the term is not original here, but is borrowed from the Greco-Egyptian legal language of the Chora.

In the Chora, in so far as Greek law is concerned, we do not find any trace of an *engraphos gamos* contrasted in principle with a union based upon an *ἀγράφως συνεῖναι*, and different from it in its legal effects. In particular, it is not entirely accurate to identify, as has sometimes been done on the basis of *P. Oxy.* II 237,[237] the marriage contracted by *ekdosis* with the *engraphos gamos*. This identification is not suggested by the text itself, except in one passage (col. VII 12 f.), which only indicates, however, an analogy with the Egyptian law (see p. 65). The document to attest the *ekdosis* was the *συγγραφὴ συνοικισίου*. From a comparison of *PSI.* VIII 921.28 ff. and *BGU.* IV 1102, 1103, III 975, *P. Lips.* 27, however, it is seen that the *ἀγράφως συνεῖναι* was considered as contrasting with *any kind* of written union, and only this is in conformity with Wenger's statements about the meaning of *agraphos* in the Greek legal language.

There was only one type of marriage, and it could be contracted by mere *de facto* union. If there were, in connection

stantial statements seem to me conformable with our theory (cf. also Seidl, *op. cit.* 423 f.). If I am right, some difficulties would disappear, if the idea that the *agraphos gamos* was a marriage of minor value were abandoned. I have to be content here with these hints.

[236a] The phrase *συμβίωσιν [ἥ]τις αὐτοῖς συνειστήκει ἄγραφος* in *PSI.* VIII 921 is hardly technical.

[237] Grenfell-Hunt, *P. Oxy.* II p. 170; Huwardas, *op. cit.* 52.

with this marriage, some points, especially with regard to property matters, which needed a special arrangement, a document could be drawn up at any time, either at the beginning of the marital life or later. But a written contract neither modified the character of the union itself nor was essential to it.[238] Consequently written contracts, except contracts of *ekdosis*, which will be discussed soon, never attest the establishment of the marriage itself, but merely include a clause, more or less detailed, concerning the personal relations of the couple, which follows acknowledgment of receipt of the dowry given in the form of a homologia. In opposition to Huwardas,[239] we may state that it does not matter in what manner the clause was drafted; for its regular stipulations, joint life and support of the woman by her husband, were natural consequences of any marriage and therefore to be understood even when people married without drawing up an instrument. This results from *P. Oxy.* II 282, where the petitioner says only (lines 4 ff.): *συνεβίω[σα] Δημ[η]τροῦτι Ἡρακλείδου κα[ὶ ἐ]γὼ μὲν οὖν ἐπεχορήγησα αὐτῇ τὰ ἐξῆς καὶ ὑπὲρ δύναμιν.* Had the union been based upon an instrument, he would not have passed over that fact in silence. The fact, emphasized by San Nicolò,[240] that a positive statement of obligation to support the wife is lacking in *PSI.* X 1115, does not accordingly indicate a distinction in principle between this text and other contemporary marriage contracts.[241]

The definite *de facto* character[242] of the marriage, written

[238] Positive evidence seems to be afforded by *BGU.* I 232.2 ff.: *ὁμ[ολογεῖ] Ἀπολλώνιος—τῇ προούσῃ κ[αὶ συν]ούσῃ· αὐτῷ κατὰ νόμους γυναικί.* Were the prior union documented by any instrument, Apollonius would refer to it, and not to the "laws," as we may suppose; cf. also p. 54.

[239] *Op. cit.* 34.

[240] *Ztschr. Sav. St. Rom. Abt.* LIII (1933), 551.

[241] The provision is lacking in *P. Mich.* II 121 recto IV 1, too, but this may be due to an omission from the abstract. Cf. E. A. R. Boak, *P. Mich.* II p. 62 f., whose first alternative is to be preferred.

[242] Already emphasized by Wenger, *op. cit.* 73, 80, with reference to the unwritten marriage.

as well as unwritten, agrees with the observation of E. Levy [243] that the divorce too was a mere *de facto* act in earlier Roman times. There is again no conflict involved if we accept Levy's suggestion [244] that, beginning with the middle of the second century, the factor that established divorce is seen increasingly to be the document drawn up about it. We can also explain the fact that documents were drawn up even for divorces of unwritten marriages. Probably it was precisely the circumstance that there was no document to be canceled when the union was dissolved that made it important to those who separated to possess written evidence of the divorce. It must be taken into consideration that in *PSI.* VIII 921.28 ff., as in other divorce declarations, only the wife's right to contract another marriage is mentioned; the instrument served to protect her from the reproach of adultery.[244a] The man in his turn might require the document in case a dowry had been given and returned, or with reference to common property.[245]

Along with marriage contracted by simply starting joint life, that based upon an *ekdosis* is found down to late times.[246] It was not, however, the document, although that was probably never omitted, that distinguished this type of marriage, but precisely the fact that the girl was *given* to the husband by the person who had control over her. The use (to be observed in *P. Oxy.* II 237) which Roman officials made of the fact that an *ekdosis* had been performed, proves that the *ekdosis* had not yet faded into an empty form.[247] The same

[243] *Der Hergang der römischen Ehescheidung* (Weimar, Boehlau 1925), 106 ff.

[244] *Op. cit.* 118; cf. 110.

[244a] See *PSI.* VIII 921: ἐξεῖ]ναι—Θερμουθαρίῳ καὶ ἑτέρῳ ἀνδρὶ ἐ[ξαῦτις συν]ορμάζοσθαι ἀσυχοφαντήτῳ οὔσῃ κατὰ πάντα τρόπον.

[245] Cf. Welles, in *Papyri und Altertumswissenschaft* (see note 110) 394; *Dura Report* VI (1936), 432[53].

[246] Instances in note 48.

[247] Nevertheless, in the general opinion of those times the importance of the *ekdosis* apparently had been relaxed considerably. This results from the non-technical use of ἐκδιδόναι; cf. *P. Oxy.* III 496.5 where it refers to the grandmother of the bride, or Cass. Dio. 58.2, about Livia: κόρας τε

conclusion follows perhaps from texts showing that the man was not the *κύριος* of a wife living with him *ἀγράφως* (see p. 29).

Thus the Greek marriage law of Roman Egypt fits in perfectly with that of the Ptolemaic kingdom. The time from which the custom of starting marital life without any written arrangement dates, is impossible to determine. Wilcken has rightly warned us to be cautious in using the term *agraphos gamos* with reference to the Ptolemaic epoch. It is true that *συνεῖναι ἀγράφως* occurs for the first time in A.D. 36 (*P. Oxy.* II 267.18 f.). But the fact, although not the term, is attested as much as twenty years earlier by *PSI.* I 36a (A.D. 11/19), which is a marriage contract of a couple already living together.[248] It may well be that the custom of omitting any written instrument became common only at the beginning of the Roman time; and certainly the Romans who had an analogy in their free marriage, also contracted by the fact of union, had no reason to put obstacles in its way. But the introduction of the new custom in Egypt meant neither the creation of a new type of marriage, nor an adaptation of the Enchoric marriage law to Roman ideas. It was an evolution inherent in the Greek homologia marriage, though perhaps favored by the fact that it corresponded in some ways to usages familiar to the Roman officials from their own law.[249] The fact that the style of the marriage contracts without *ekdosis* of the Roman time is very similar to that of the Ptolemaic homologia (see especially *P. Oxy.* II 265) confirms our conclusion from the formal side.[250]

V. Now I think we are prepared to understand one of the most troublesome texts relating to our subject, that is, *P. Oxy.*

πολλοῖς συνεξεδεδώκει (see U. Wilcken, *Ztschr. Sav. St. Rom. Abt.* XXX [1909], 506). With regard to what follows see addendum on page vi.

[248] Cf. also *P. Oxy.* II 282 of A.D. 30/35.

[249] In another way Arangio-Ruiz, *op. cit.* 72, Petropoulos, *op. cit.* 124 f.; A. Ehrhardt, Pauly-Wissowa *s.v.* "Nuptiae" (p. 5 col. I of the reprint). Opposite to them also Huwardas, *op. cit.* 53.

[250] As to the continuity of the Ptolemaic private law after the Roman conquest, cf. generally W. Kunkel in *Studi in onore di Salvatore Riccobono* I 430 f.

II 267 (Mitteis, *Chrest.* 281). In A.D. 36 the weaver Tryphon [251] son of Dionysios, Πέρσης τῆς ἐπιγονῆς, acknowledges, in the form of a *diagraphe*, to Saraeus daughter of Apion that he has received from her a "loan" of 72 drachmas, consisting of 40 drachmas silver, one pair of earrings worth 20 drachmas, and one dress worth 12 drachmas. He pledges himself to return the loan after five months, and to pay the *hemiolion* in the event of deferred payment; further he concedes to Saraeus the πρᾶξις καθάπερ ἐγ δίκης. Apparently the transaction is related to the fact that the parties are living in an unwritten union (lines 18 f.). In case that they separate before the five months are over,[252] Tryphon will only return the earrings ἐν τῆι ἴσῃ διατιμ[ήσ]ει, and some provision is made for the event of the woman being pregnant when separating from the man. Actually the capital was paid back only after seven years and without *hemiolion* (lines 34 ff.).

In my opinion, the interpretation of this peculiar document requires consideration of the special circumstances of this case. We know from *P. Oxy.* II 282 (Mitteis, *Chrest.* 117; A.D. 30/35) that Tryphon had had a bad experience with a first wife, and probably he was not much inclined to marry again. In this way I explain with Grenfell and Hunt [253] the words (lines 9 f.): ὑπὲρ ὧν καὶ συμπέπεισμαι. In naïve frankness Tryphon admits that it was the goods brought to him by Saraeus that had persuaded him to enter into another union. This excludes [254] the opinion of some writers [255] that the loan was

[251] Cf. E. H. Brewster, *A weaver's life in Oxyrhynchus* in *Classical Studies in honor of John C. Rolfe* (Philadelphia, Un. of Pennsylvania Press, 1931).

[252] This is the way that I understand line 17. See also Mitteis, *Arch. f. Papyr.* I 349; R. De Ruggiero, *Bull. dell' Ist. di Dir. Rom.* XV (1903), 224; L. Tripiccione, *op. cit.* (see note 5), 59, 61.

[253] *P. Oxy.* II p. 245.

[254] In the same way Grenfell-Hunt, *op. cit.* 247. Cf. De Ruggiero, *op. cit.* 219, furthermore Petropoulos, *op. cit.* 127, and Huwardas, *op. cit.* 48.

[255] Mitteis, *op. cit.* (see note 252) and introduction to *Chrest.* 281; Nietzold, *Die Ehe in Aegypten zur ptolemäisch-römischen Zeit* (Leipzig, 1903; quoted according to De Ruggiero, *op. cit.* 281); Tripiccione, *op. cit.* 62 f.; Arangio-Ruiz, *op. cit.* 73. The fact that the earrings were to be returned

fictitious and really a *donatio ante nuptias* made by Tryphon to Saraeus. It also makes understandable both the fact that the expression *pherne* was avoided and the further fact that the arrangement was made for a short time only. It explains too the loss of the "loan," except the earrings, to be suffered by Saraeus in case that they separate before the close of the five-month period. Apparently Tryphon did not want to make a definite arrangement. It has been suggested [256] that our text attests an "alimentary capital" brought by the woman for the period of a temporary unwritten association to be converted into a "full" (that is, written) marriage at the end of the period; but the papyrus makes no mention of such an intention.[257] Nor can we agree with the hypothesis that the *συνεῖναι ἀγράφως* had already existed for some time when this contract was drawn up.[258] It is true that the union was not established by the present agreement; this follows without doubt from lines 18 f.: *ἐπεὶ δὲ σύνεσμεν ἀλλήλοις ἀγράφως.* But according to lines 9 f. just mentioned, I believe the "loan contract" was made in addition to, but (for the reasons just pointed out) deliberately separated from, the union contracted *simultaneously* *ἀγράφως.* In fact the arrangement was a trial.[259] It proved so successful that, as we know from other papyri, the pair were still living together decades later.[260] This must also be the reason why the capital was repaid, and without *hemiolion*, only after seven years. It is not in fact obvious why it was repaid at all.

ἐν τῆι ἴσηι διατιμ[ή]σει in case of an *ἀπαλλαγή* (line 18) does not support, in my opinion, the theory of a fiction (otherwise Arangio-Ruiz, *op. cit.* 73[1]). I think it means that the fixed value may be returned instead of the objects themselves (see also De Ruggiero, *op. cit.* 224).

[256] B. Frese, *Aus dem gräko-ägyptischen Rechtsleben* (Halle, 1909), 41; R. De Ruggiero in *Studi storici per l'Antichità Classica* (1908), 178 f. Possible conversion into a written marriage is also considered by Mitteis and Arangio-Ruiz, *opp. citt.* Cf. Huwardas, *op. cit.* 48[1].

[257] In the same way Tripiccione, *op. cit.* 60.

[258] For example, Mitteis and Arangio-Ruiz, *opp. citt.*

[259] In the same way Grenfell-Hunt, *op. cit.* 245.

[260] Mitteis, introduction to *Chrest.* 281.

If this interpretation is true, it is not without significance for legal history. In a sense we come back to the theory of a "trial marriage." This does not mean, to be sure, that the trial marriage was an institution of the Greco-Egyptian legal system; that theory was definitely refuted decades ago.[261] But a trial union was the particular intent of the agreement of Tryphon and Saraeus. As in other cases, we may take this *συνεῖναι ἀγράφως* to be a lawful marriage with all the consequences to follow from a marriage.[262] But the papyrus shows the vast extent and the adaptability of this idea in the Greco-Egyptian law. Any serious and exclusive union of a man and a woman, even if limited so definitely and so consciously as in *P. Oxy.* II 267, was admissible as a real marriage.[263] As a matter of fact, the boundaries between marriage and concubinage are erased by such a law. Hence I conclude that this almost unlimited extension of the idea of marriage explains the striking rarity, except in the case of Roman soldiers, for whom marriage was positively prohibited, of concubinage in Ptolemaic and Roman Egypt.

[261] See Mitteis, *Grundzüge*, 201 f.

[262] The provision made for the event of a pregnancy of Saraeus at the time of a possible divorce, lines 18 ff., is in conformity with this assertion rather than in conflict with it. Similar provisions occur in *P. Oxy.* III 496.10, 603 (= *Stud. Pal.* IV [1905] 24), and X 1273. See also *P. Fay.* 22 with R. Taubenschlag in *Studi in onore di Salvatore Riccobono* I 511.

[263] The population of Egypt seems to have always been familiar with the idea of a marriage contracted for a limited term. As to the Egyptian law, such marriages are evidenced by *Ostr. Dem. Strassb.* 1845 (Edgerton, *Notes on Eg. Marr.* 17) and by *BGU.* VIII 1827.20 f. (E. Seidl, *Deutsche Literaturzeitung* [1933], 2282.) Cf. also Edgerton's, *op. cit.* 16, interesting hint at the continued existence of the idea in Egypt. In all of these cases, however, there is no trace of the idea of a trial marriage.—Generally about trial marriage and marriage for a limited term: P. Vinogradoff, *Outlines of Historical Jurisprudence* I 247 f.

CHAPTER III

THE RÔLE OF THE DOCUMENT

When we consider the fact that the Greek law of Ptolemaic, as well as Roman, Egypt regarded the fact of union as establishing a contract of marriage, the question arises whether, conversely, the validity of the document, when it preceded actual union, depended upon such union.

P. UPZ. I 66 (B.C. 153):

Σαραπίων Πτολεμαίῳ καὶ Ἀπολλωνίῳ τοῖς ἀδελφοῖς χαίρειν.—συγγέγραμμαι τῇι Ἑσπέρου θυγατρί, μέλλω δὲ ἰσάγειν ἐν τῷ Μεσορὴ μηνί. —γέγραφ' ἰμεῖν (*l.* ὑμῖν) ἵν' εἰδῆται. παραγεν{ομεν}οῦ δὲ εἰς τὴν ἡμέραν, Ἀπολλώνιος. ἔρρωσο. (ἔτους) κη' Ἐπεὶφ κα'.

From this letter it appears that the *eisagoge*, with which no doubt the joint life of the couple started, could be celebrated some time after the instrument had been drawn up. Wilcken, after having abandoned—in view of the fact that *engyesis* is unknown in the legal system of the papyri—his former opinion [264] that the *syngraphe* referred to in the letter represented an *engyesis* which was to be followed by the *eisagoge* on the occasion of the *ekdosis*, believes now [265] that it was a συγγραφὴ συνοικισίου which did not become effective until it was ratified by the "taking home" of the bride.

If I am right, the sources do not agree with Wilcken's new opinion either. No *eisagoge* is mentioned in connection with the celebration of the marriage in other sources; [266] and I should like to draw the conclusion from this circumstance that it was really without legal import. Had it been important in any way—say in case there was an instrument prior

[264] *UPZ.* I 322 f. In the same way Bozza, *op. cit.* 214.

[265] *UPZ.* I 652 f.

[266] Only *BGU.* VI 1463.7 (B.C. 247/6): ἰσπορεύσεται Φ[ιλωτέρα] πρὸς Ἀκέσανδρον ᾱ Τῦβι might appear somewhat parallel.

to the actual union, in the way suggested by Wilcken, or else as a condition of the legality of an *ἀγράφως συνεῖναι* [267]—we should hear more about it. If the *eisagoge* was a common custom of Egyptian Greeks, we may conclude that it was a part of the domestic celebration of the wedding and nothing more.[268] Reciprocal obligations, especially those of loyalty and fidelity—but not, of course, the wife's obligation to stay in her husband's house—together with penalties stipulated for breaking them, must be regarded as effective from the moment the marriage document was drawn up.

But we do not have to be content with this *argumentum e silentio*. In Philo Alex. *De Spec. Leg.* 3.72 we read:

Μεθόριόν τινες ὑπολαμβάνουσιν ἀδίκημα εἶναι φθορᾶς καὶ μοιχείας ὑπογάμιον, ὅταν ὁμολογίαι μὲν ὑπερεγγυήσωσι, μήπω δὲ τῶν γάμων ἐπιτελεσθέντων ἕτερος ἀπατήσας τις ἢ καὶ βιασάμενος εἰς ὁμιλίαν ἔλθῃ. παρ' ἐμοὶ δὲ κριτῇ μοιχείας καὶ τοῦτ' ἐστιν εἶδος· αἱ γὰρ ὁμολογίαι γάμοις ἰσοδυναμοῦσιν, αἷς ἀνδρὸς ὄνομα καὶ γυναικὸς καὶ τὰ ἄλλα τὰ ἐπὶ συνόδοις ἐγγράφεται.

As to the marriage law used by Egyptian, or at least Alexandrian, Jews, Philo states that the offense of adultery was possible from the time the *homologiai* were drawn up, even in case actual joint life had not yet started.

To the law of what national group does he refer? E. R.

[267] With A. Ehrhardt in *Symb. Friburg.* (see note 1), 102, and Pauly-Wissowa *s.v.* "Nuptiae" (p. 1 col. 2 of the reprint), I believe that in the Roman law as well the solemn *deductio in domum mariti* regularly was not considered a legal condition of the marriage. Scaev. *Dig.* 24.1.66.1 only uses it for determining the time when the marriage was to be considered as contracted, Ulp. *Dig.* 35.1.15 for proving the fact that there really was a marriage. Both of these passages do not exclude, however, the possibility that the marriage, that is, the actual union, could be established otherwise. Cf. Madeleine Rage-Brocart, *Rites de mariage: La deductio in domum mariti* (Paris, Domat-Montchrestien, 1934), 105 ff., 127 f., also P. E. Corbett, *op. cit.* (see note 93) 94. (The maxim of *libera esse debent matrimonia*, however, does not refer to this question, see note 308.)

[268] As to wedding rites in Egypt: J. G. Winter, *Life and Letters in the Papyri* (Ann Arbor, Univ. of Mich. Press, 1934), 118; in classic Greece: Erdmann, *op. cit.* (see note 95) 250 ff.

Goodenough [269] is of the opinion that Philo alludes to the Greek *syngraphe homologias:* "It is this Ptolemaic preliminary marriage which Philo has fitted back into the Jewish scriptural law." A. Gulak,[270] on the other hand, considers it specifically Jewish law, and his opinion seems to be supported by the fact that Philo, in the same connection, refers to institutions and ideas of undoubted Biblical origin: in 3.73 he mentions the stoning, and § 74 obviously (and apparently §§ 80 f. too) is taken from *Deut.* 22.23–27. Gulak's theory is not far from a hypothesis which P. Koschaker has suggested to me by letter; and his explanation seems to me convincing. He compares, as does Gulak, Philo's *homologiai* with the *ketuba* of the Talmudic law, which he regards as the written promise of a nuptial gift, derived from, and therefore equivalent to, the Biblical *mohar*—that is, the purchase price the man had, in primitive law, to give the father or guardian for his wife. Thus he interprets Philo's words by taking them to represent a conception of marriage as a kind of purchase. Now it is the primitive idea that purchase is an immediate exchange of price and goods; hence the purchaser, on paying the price or an *arrha*, has already acquired some right in the object before it is conveyed to him. Consequently violation by intercourse with another man of the contract relation established by the *ketuba* is adultery—an idea that is common [271] to legal systems which retain in any way (with modifications when the nuptial gift replaces the purchase consideration) the conception that marriage is contracted by a kind of purchase.

Thus Philo is apparently dealing with ideas natural to the Jewish law. This fact, however, does not necessarily exclude his evidence from our investigation of the Greek law of Egypt. Philo calls the document that precedes the realization of the

[269] *The Jurisprudence of the Jewish Courts in Egypt* (New Haven, Yale Univ. Press, 1929), 95. Cf. J. Heinemann, *Philons griechische und jüdische Bildung* (1932), 292 f.

[270] *Das Urkundenwesen im Talmud* (Jerusalem, 1935), 38.

[271] See P. Koschaker, *Ztschr. f. ausländ. und internat. Privatrecht* XI (1937), Sonderheft 94, where further quotations are given.

marriage, and that he considers equivalent to the marriage (that is, to its realization), ὁμολογίαι, and we know that in his time the Greek marriage document could be drafted in the form of a homologia. Furthermore, the evidence of *P. Ent.* 23 makes the adoption by Egyptian Jews of Greek forms in marital matters appear likely. Koschaker also considers, with reference to Philo, that the Jewish marriage law was assimilated to Greek forms.[272] In view of these facts, it does not seem improper to infer that the Greek law of Egypt did not greatly differ from the Jewish law in the importance it attributed to a contract of marriage.

It is true that this inference faces the difficulty that there is no immediate trace of the purchase concept of marriage in the Greek papyri. Neither in Ptolemaic nor in Roman sources is the nuptial gift ever found before the fourth century A.D. (see note 325); and from *P. Eleph.* 1 on, marriage contracts, as well as other evidence, testify to the existence of the dotal system only. Nevertheless, I do believe that the Greek marriage law by its inherent character was bound to lead to the legal principle that Philo deduced from Jewish law.

It is a well established result of recent researches that the Greek marriage law—like those of other nations, Indo-Germanic as well as non-Indo-Germanic, whose social system was patriarchal—started with the purchase concept of marriage.[273] This system was replaced, in comparatively early times, by that in which the bride, together with a προῖξ, was given to the husband by the person who had *potestas* over her without any requirement of a consideration or a nuptial gift from the husband. But to W. Erdmann [274] we owe a demon-

[272] Owing to his erroneous opinion that the written marriage was specifically the marriage of the Egyptian law, Petropoulos, Κοινοκτημοσύνη (see note 110) 76[28], believes in an adaptation to the Egyptian law.

[273] See Erdmann, *op. cit.* 204, who gives further quotations.

[274] *Op. cit.* 212 ff.; cf. H. Kreller, *Ztschr. Sav. St. Rom. Abt.* LV (1935), 365. Formerly in a very similar way C. W. Westrup, *Ztschr. f. vergl. Rechtswiss.* XLII (1926), 114 ff., and most recently Koschaker, *op. cit.* (see note 271) 86 f.

stration of the fact that the new system, far from being fundamentally at variance with the former, came into existence through evolution due to a change of economic conditions. We may add that his conclusion seems to be in harmony with provisions for dealing with a dowry in case of infraction of the marriage contract by either party, which are found precisely in those papyri that represent pure Greek law (see p. 33): namely, loss of the dowry by the wife, if guilty; restitution of the *pherne*, with an additional penalty of 100 per cent (*P. Eleph.* 1) or 50 per cent (for example, *BGU.* IV 1050) of its value by the man, if guilty. In fact, this makes the *pherne* very close to an *arrha* (see also note 283).

This view, that there was an unbroken connection with the original concept, explains the nature of *engyesis* in classic Attic law.[275] The combination of *engyesis* and *ekdosis* con-

[275] Most recently Erdmann, *op. cit.* 225 ff., whose assumptions may be accepted, in my opinion, except his analogy between *engyesis* and *ekdosis* on the one hand, and the Romanistic categories of obligatory contract and fulfilment on the other, *op. cit.* 233 f., 237; this does not agree with his own view (justly criticized by B. Kübler, *Phil. Wochenschr.* LV [1935], 1380; H. Kreller, *Ztschr. Sav. St. Rom. Abt.* LV [1935], 364 f.; Koschaker, *op. cit.* [see note 271] 98).

At the same time that Erdmann published his book, a very different construction was put upon the *engyesis* by Francesca Bozza, *Il matrimonio nel diritto attico* (*Annali del Seminario Giuridico della R. Università di Catania* I [1934]). In her view the *engyesis* was a contract of guarantee between the *kyrios* of the bride and her future husband, the latter pledging himself to keep his wife in a lawful marriage (p. 15 f., 21 f. of the reprint; accepted by Kreller, *op. cit.* 480, and C. Predella, *Archiv. Giur.* CXIV [1935], 124 f.; in a similar way Kübler, *op. cit.*). In my opinion, Bozza's view is incorrect. It is due, above all, to a disregard of the connection which existed between the primitive purchase-marriage and the *engyesis*. The fact that the bridegroom could give a promise on the occasion of the *engyesis* (Isaeus 3.70) is not decisive in favor of Bozza's construction. It is compatible with our view also, and has undoubted parallels in Germanic laws (J. Partsch, *Griechisches Bürgschaftsrecht* I [Leipzig, Teubner, 1909], 50 f.; cf. also Westrup, *op. cit.* 92[2]). Within the sphere of the Greek papyri we may appeal to *P. Eleph.* 1; this evidence should be considered decisive (as to its substantial identity with the Attic *engyesis* see p. 79). A further argument brought forward by Bozza (*op. cit.* 19) is that the central importance of *engyesis* in the Attic law was due to a positive innovation of the Solonian legislation. This may be true, but it does not

stituted the Athenian marriage in this sense, that *ekdosis* was the actual but obligatory completion of the transaction. This means that the *engyesis* was a contract to create the marriage itself, and not a mere engagement; but marriage definitely ensued only on completion by *ekdosis*.[276] The bride legally was considered as a mere object of the contract that was

prove anything. Before the Solonian reform, legitimate children could also be born of a *pallake* (law of Dracon quoted in Dem. 32.53; see Erdmann, *op. cit.* 108), while the new law (Dem. 46.18) made the legitimacy of the descendants dependent upon the condition of their mother being a *damar*, that is, a woman married with observation of all the solemnities dictated by the law including *engyesis*. The purpose of the enactment was to reserve to those children exclusively the rights which followed from legitimacy within the public and sacral organization of the city (see p. 28, 46). Provided it is right, Erdmann's (*op. cit.* 369) assertion that the law quoted in Demosthenes' speech 43.51 (cf. Isaeus 6.47) also should be ascribed to Solon, perfectly harmonizes with our theory. The fact, finally, that dissolution of the relation created by means of an *engyesis* did not require a regular divorce by either ἀποπομπή or ἀπόλειψις (see Bozza, *op. cit.* 12 f.) is simply a consequence of the circumstance that the marriage was not *perfected* before the *ekdosis* was performed. Both ἀποπομπή and ἀπόλειψις clearly depended upon joint life. Cf. Koschaker, *op. cit.* 95, whose views I generally accept with regard to the juridical construction to be put upon the whole system in question.

[276] Cf. J. Partsch, *P. Freib.* III 16 f. But, as the same author (*Griech. Bürgschaftsrecht* 46 ff.) has shown, ἐγγυᾶν means "to hand over." We may assume with him (*op. cit.* 48) that, at least originally, the *engyesis* was made by handing over the bride to the bridegroom. It is true that this has been disputed not only by Bozza (*op. cit.* 4 f., 10), but also by Erdmann (*op. cit.* 231 f.) and Koschaker (*op. cit.* 92). But no other construction would agree with the fact that the woman herself is considered as the object of the *engyesis* (cf. E. Weiss, *Griech. Privatrecht* I [see note 132] 223 f.), and our inference fully agrees, on the other hand, with the instances cited by Erdmann himself, *op. cit.* 243 f. The fact that the actual transfer of the bride normally was separated by a space of time from the *engyesis* does not conflict with our view, as is further proved by the fact that in the Ptolemaic law the two parts of the transaction actually fused into *one* act, characteristically called *ekdosis*. It seems to me that it is precisely this meaning of *engyesis* that explains the use of the same word for denoting the establishment both of a marriage and of a guarantee (see Partsch, *op. cit.* 93 f., and, above all, F. Beyerle, *Ztschr. Sav. St. German. Abt.* XLVII [1927], 598 ff., 605). Constitution of the "engagement" by making a fictitious entrustment to the man of the girl, such as was known to Germanic laws (H. Meyer, *Ztschr. Sav. St. German. Abt.* XLVII [1927], 203, with further quotations), seems to be a comparable practice.

made by and between her *κύριος* and her future husband. A consequence of this form of marriage, and therefore an essential element of a lawful marriage,[277] was the acquisition by the man of the position of *κύριος*[278] (hence the *engyesis* was inapplicable to the marriage between *ἀγχιστεύς* and *ἐπίκληρος*).[279]

This situation not only agrees with facts revealed by comparative legal history[280] but also throws light on the papyri. It is true that *engyesis* was not an institution of the Greek marriage law of Egypt (see note 86). But this merely means that *engyesis* was not recognized, as it was in Athens, as a special contract systematically separated from, and conditional to, *ekdosis*. Its legal functions were fulfilled by the contract, documented through the *συγγραφὴ συνοικισίου*, dealing with the *ekdosis* itself.[281] In view of the fact that both *engyesis* and *ekdosis* were two phases of the same transaction, jointly constituting a definite and lawful marriage, such a fusion does not surprise us.

As Erdmann has further plausibly suggested,[282] *engyesis* had the effect of binding the parties to some extent, at least by putting indirect pressure upon them, inasmuch as either the "bridegroom" (who was, of course, not a betrothed man in the modern meaning of the word, but already a husband, although, so to speak, *in statu nascendi*), if he refused to receive the "bride," or the latter's *κύριος*, if he failed to give her to the man, lost the dowry that as a rule was given on the occasion of *engyesis*. This is in line, though the connection is more remote, with the situation in corresponding transactions contracted under legal systems nearer to the common point of

[277] Erdmann, *op. cit.* 225.

[278] Erdmann, *op. cit.* 267.

[279] Erdmann, *op. cit.* 246.

[280] Cf. Erdmann, *op. cit.* 239, and, above all, Koschaker, *op. cit.* 89 ff., especially 93 ff. I also agree with the prevailing opinion (quotations given by W. Kunkel in Pauly-Wissowa *s.v.* "Matrimonium" 2270; most recently Koschaker, *op. cit.* 84 f.) as to direct descent from a purchase-like transaction of the Roman *coemptio* (see my article quoted in note 106, p. 153).

[281] Formerly in a similar way Partsch, *P. Freib.* III 17.

[282] *Op. cit.* 240.

departure, which have preserved the principle that it is the future husband who has to convey property.[283] I believe that we are right in claiming an analogous function for the *συγγραφὴ συνοικισίου* (that is, in substance, the contract relating to *ekdosis*) in the law of the papyri. This fits in with, and simultaneously provides a firm juridicial and historical basis for, our interpretation of *P. UPZ.* I 66, particularly as the early date of the papyrus suggests that the *syngraphe* mentioned was a *συγγραφὴ συνοικισίου* (probably with a self-*ekdosis*, like *P. Giess.* 2), and not a *συγγραφὴ ὁμολογίας*.[284]

It stands to reason that principles governing the *συγγραφὴ συνοικισίου* are not applicable forthwith to the *συγγραφὴ ὁμολογίας*,[285] and it cannot be safely asserted, therefore, that the latter also could be effective before the couple were united. I believe, however, that this was the case. It is likely that, from the time when it began to replace the *συγγραφὴ συνοικισίου*, the *συγγραφὴ ὁμολογίας* was assimilated to the real marriage instrument in every respect; and Philo seems to support this opinion. Yet his passage shows that by his time there were jurists who doubted whether real adultery could be committed as long as actual marital life did not exist, since the juridical origin of this effect of the incomplete contract was no longer understood (Koschaker). Can this misunderstanding have been caused by the fact that it was precisely the homologia that was in question? It should be noticed in this connection

[283] Cf. Erdmann, *op. cit.* 241, who compares the dowry to an *arrha*. This comparison clearly must not be taken literally, but see Koschaker, *op. cit.* 92: "Sicher ist, dass in ihr (*scil. engyesis*) keine Spur eines kaufrechtilchen Arrhalverlöbnisses zu finden ist, wenn man nicht in der mit der *ἐγγύησις* regelmässig verbundenen Bestellung der Mitgift, die möglicherweise auf den Brautpreis zurückgeht, die Brücke zur alten Kaufehe herstellen will." As we just have seen, the papyri seem to support such a supposition (see p. 77).

[284] Philo's decision itself, as well as the controversy reported by him, depends upon the question of public punishment of adultery. We do not know whether this existed in the Greek law of either Alexandria or the Chora. At any rate, the idea was not alien to Greek laws, see Erdmann, *op. cit.* 291, 297 ff.

[285] On its nature see p. 18 ff.

that Goodenough [286] is inclined to ascribe the divergent opinion to Greek jurists. But I do not want to lose myself in mere supposition.

By linking the Greek marriage law of Egypt with its origins in old Greece, these statements confirm what we have pointed out in the previous chapters. In the Hellenistic law of Egypt, marriage was consummated community of life (*verwirklichte Lebensgemeinschaft*), as was the Roman marriage,[287] of a couple who united with intent to establish a union that should be exclusive and persistent, although dissoluble at any time, and sometimes limited to a stipulated term. Its recognition by the law required neither the condition of a written agreement nor any other formality;[288] *ἀγράφως συνεῖναι* could be, and eventually was, considered sufficient. The passing over of the woman into her husband's family was no longer required; and marriage was reduced to a mere personal relationship of the spouses.

But in the last analysis, this whole system had its roots in, and was a later feebler stage of, the ideas that had dominated the classic marriage law of the mother country. The old custom of giving the daughter in marriage by entrusting her,

[286] *Op. cit.* (see note 269) 95.

[287] E. Levy, *Herg. der röm. Ehescheidung* 67, *Ztschr. Sav. St. Rom. Abt.* LII (1932), 532. Formerly L. Mitteis, *Römisches Privatrecht bis auf die Zeit Diokletians* (Leipzig, Duncker and Humblot, 1908) I 131[19].

[288] Nor was the *copula carnalis* a legal condition. A few papyri from Hermopolis, all of the second half of the fourth century A.D., mention it indeed as constituting an unwritten union: *P. Lips.* 41 recto (Mitteis, *Chrest.* 300; line 7: *δι[ὸ] καὶ οἱ γάμοι συνῄφθησαν*, cf. Wenger, *op. cit.* [see note 5] 77), *P. Cair. Preis.* 2 and 3 (*P.* 2 line 8 f.: *ἐξετέλεσα καὶ τὸ συνῆθες τῶν γάμων*). But they are too isolated and too late to afford evidence that this element was a legal requirement, and certainly do not refer to Greeks. Nor do either *Cod. Just.* 5.5.8 (Zeno, A.D. 475) or *P. Lond.* V 1708 (Antinoupolis, *ca.* A.D. 567; lines 43/44: *ἠνίκα ἔγημον τὴν αὐτοῦ ἀδελφὴν, εὐθέως μετὰ τοὺς ἐπιτελεσθέντας γάμους*). On the other hand legal language of the papyri which simply terms the matrimony *συνοικίσιον[-σία]* (*Dura Perg.* 22: *συνοικισμός*) or *συμβίωσις* (*Dura Pap.* 90 [C. B. Welles, *Dura Report* VI, 1936, 437]: *κο]ινοβίωσις*), and living in a marital union *συμβιοῦν, συνοικεῖν, συνεῖναι*, is a serious obstacle.—In general see Koschaker, *op. cit.* 88.

and the power over her, to the husband persisted; and at least in the first two centuries of the Ptolemaic period its importance was still felt to some extent, as is shown by the transitional scheme of self-*ekdosis*. Thus in accordance with its original nature, the contract relating to *ekdosis* (that is to say, the *συγγραφὴ συνοικισίου*[289]) was probably immediately binding on the parties before the actual union commenced, and it may be that this efficacy later was ascribed by analogy to the *syngraphe homologias* also.

The classic Greek family law was private as well as public law at the same time; and its connection with the political and sacral organization of the *polis* was its strongest support. It was the lack of this connection that paved the way for a new and freer system. *Dura Perg.* 22 indicates that the evolution noted in Egypt was achieved sooner or later wherever in Hellenistic times Greeks lived without having a *polis*. For similar reasons the informal marriage was acknowledged as lawful even in the cities of Alexandria and Ptolemais.

[289] Only in this way can we accept the characterization of the document drawn up with reference to an *engraphos gamos* as a "dispositive" instrument (see Mitteis, *Grundzüge* 49; H. Steinacker, *Die antiken Grundlagen der frühmittelalterlichen Privaturkunde* [Leipzig, Teubner, 1927], 38).

CHAPTER IV

THE WRITTEN MARRIAGE IN THE LEGISLATION OF JUSTINIAN

I. Our previous inquiry establishes the inference that the imperial chancellery of both classical and postclassical times, strongly maintaining the dogma that marriage did not require any special form in order to be recognized by the law,[290] and repeatedly rejecting differing opinions, was in conformity not only with the principles of Roman law, but also with the customs of the Greek population. In so far as we observe that there was in the latest legislation a tendency to extend the importance of written agreements relating to dowry and nuptial gift for the legality of the marriage itself (without, however, affecting the principle just mentioned), its roots are not to be sought in the Greek sphere. And anticipating the result of our subsequent inquiry, we may take a further step: This tendency by no means had its roots in ideas of eastern or western native laws.[291]

1. There is evidence of the fact that contracting marriage by *de facto* union was practiced in the eastern parts of the Empire down to the Byzantine period.

A well-known passage of the so-called *Syro-Roman Lawbook*, *Lond.* 93 (paragraph 1), reads in C. Ferrini's translation:

> Quod ad matrimonium vero hominum, *φερνήν* et *δωρεάν* quam scribunt vir et uxor inter se, sunt [292] populi complures, quibus non est mos, ut utantur scriptura instrumentorum inter uxorem et

[290] W. Kunkel, in Pauly-Wissowa, *s.v.* "Matrimonium" 2272. For *Nov. Maior.* 6.9 see p. 92.

[291] I cannot, therefore, agree with P. Koschaker, *op. cit.* (see note 271), 87[2] who considers that those tendencies were caused by a return to the primitive idea of the purchase-like character of marriage, suggested to the Roman legislation by Oriental and Germanic laws.

[292] Sachau (see note 296) translates this in preterite form.

virum, quae vocantur *φερναί*. sed sufficit eis id tantum, ut in *παρρησίᾳ* spondeant mulieres et coronent eas corona gloriosa virginitatis, ut in pace et gaudio ducant mulieres a domo parentum in domus suas. et hanc *παρρησίαν* admittunt *νόμοι*, sicut *φερνάς* quae scribuntur inter uxorem et virum, et heredes fiunt earum filii mulierum, quae sine *φερναῖς* viris fuerint (nuptae),[293] tantum si in *παρρησίᾳ* fuerint (nuptae) secundum *νόμους* omnis regionis.

In a recent study,[294] A. Ehrhardt has pointed out that *παρρησία* means *libertas*,[295] *licentia*, and that, as had already been suggested by C. G. Bruns [296] and L. Mitteis,[297] the marriage contracted *παρρησίᾳ* differed from the marriage with *φερναί* only in that a document relating to *dos* and *donatio ante nuptias* was not drawn up.

As to the nature of the *parrhesia* marriage, it is important to note that the coronation of the maiden bride was not a legally constitutive element of this kind of marriage. Stefan Brassloff [298] has demonstrated that in Syria a marrying pair was considered as a king and queen. The crown worn by the bride was originally a queen's crown, and it is an inviting suggestion [299] that it changed its character, becoming a mark of virginity, because the Roman government for political reasons prohibited the custom of adorning private persons with royal insignia. This origin, if Brassloff is right,[300] indi-

[293] See Ehrhardt (see next note), 91 f.

[294] Παρρησία, in *Symbolae Friburgenses* (see note 1) 80 ff. Former opinions are quoted and discussed by Ehrhardt. (C. A. Nallino's article, Παρρησία *e nozze senza scrittura nel libro siroromano* in *Rivista degli Studi Orientali* x [1923], 58 ff., was not accessible to me.)

[295] This explanation had already been given by C. Ferrini in S. Riccobono-I. Baviera-C. Ferrini, *Fontes iuris Romani anteiustiniani* (Florence, 1909) II 661^{3}.

[296] In Bruns-Sachau, *Syrisch-römisches Rechtsbuch aus dem fünften Jahrhundert* (1880), 267 ff.

[297] *Reichsrecht und Volksrecht* (see note 2) 226, 290.

[298] *Zur Kenntnis des Volksrechts in den romanisierten Ostprovinzen des römischen Kaiserreichs* (Weimar, Böhlau, 1902), 89 f.

[299] Brassloff, *op. cit.* 90.

[300] It must not be disregarded that it is not certain whether our source really referred to Syria, see p. 87.

It should be noticed that it also would fit in with our inferences, if the

cates that the coronation was merely a wedding custom, but not an *essentiale negotii*,[301] and that its omission could not affect the legal validity of the marriage. The only constitutive element of the marriage contracted παρρησίᾳ was, therefore, the *ductio*, that is, the actual union of the couple. Hence I am unable to agree with Brassloff's conclusion[302] that the *parrhesia* marriage ceremony could not be employed in the case of a woman's second marriage. Virginity was a condition only of the coronation, which was a secondary element. Just as coronation and *ductio* were not incompatible with drawing up a document relating to dowry and nuptial gift,[303] so the "free" or *parrhesia* marriage (that is, the marriage contracted without such a document) was a general form, and acknowledged as lawful in all cases, whether of first or later marriages, by the nationalities which used it.[304] Thus the fact requires no explanation that in the law of the *Ecloge* of Constantinople of the eighth century the *secundae nuptiae* could still be contracted "without writing" (*Ecl.* 2.10).[305]

With regard to the national sphere to which the *parrhesia* marriage belonged, I do not agree with the opinion of Ehrhardt,[306] who believes that the author of our source, in drawing

crown should stamp the bride as the prospective mistress of the common household, as O. Zallinger and H. Meyer suppose with reference to the crown worn by the medieval German bride (see H. Meyer, *Ztschr. Sav. St. German. Abt.* LII [1932], 372). This dignity depends on equality of husband and wife (Meyer), and so the crown would be a symbol exactly adequate to the παρρησία marriage. I should not understand, however, from this point of view, the reservation of the crown for the virgin bride (also in Germany, see O. Laufer, *Ztschr. f. Volkskunde* N.F. II [1930], 25 ff.).

[301] In another way Brassloff, *op. cit.* 80.

[302] *Op. cit.* 82 ff., accepted by J. Partsch, *Ztschr. Sav. St. Rom. Abt.* XXX (1909), 388 f., disputed by D. B. Bosdas, *op. cit.* (see note 5) 37[59].

[303] Ehrhardt, *op. cit.* 94 f.

[304] The same conclusion has been reached by Ehrhardt, *op. cit.* 95 f.

[305] Brassloff, *op. cit.* 79. The particulars of the *agraphos gamos* of the Ecloge, differing in some ways from those of the free marriage of the Roman law, as well as from *Lond.* 93, and their origins, need not be dealt with here. As to these, I can refer now to Bosdas, *op. cit.*

[306] *Op. cit.* 106 f. Formerly in a similar manner Bruns and Mitteis, *opp. citt.* Cf. also Arangio-Ruiz, *Persone e famiglia* 83[1].

up *Lond.* 93, merely referred to the imperial practice, the intent of which was to enforce recognition of the Roman free marriage in face of provincial opinions that the legality of the marriage depended upon drawing up a document about dowry and nuptial gift. *Lond.* 93 evidently sketches native customs including particulars partially alien to the Roman custom.[307] The mention of *νόμοι omnis regionis* seems to refer to imperial decrees, not, however, in the sense that the *parrhesia* marriage is considered to be prescribed by them, but only with the implication that they permitted this form which was practiced by a number of nationalities. The *parrhesia* marriage no doubt was an institution that existed in the laws of certain nationalities of the eastern part of the Empire.[308]

What nationalities were these? Brassloff [309] thinks of Oriental nations exclusively. In his opinion the distinction drawn in *Lond.* 93 is not to be identified with that between East and West which occurs in *Par.* 40, *Arm.* 45, and *Ar.* 51 of the *Syro-Roman Lawbook*, the last of which passages includes Constantinople and European Greece in the "West." It must be admitted that the parallels, adduced by Brassloff,[310] that exist between the rites sketched in *Lond.* 93 on the one hand, and Jewish and Syriac customs, on the other, force us to consider possible relations between the *parrhesia* marriage of

[307] Cf. Brassloff, *op. cit.* 76 f.

[308] Although Ehrhardt's interpretation of *παρρησία* as *libertas* is right, his identification of this idea with that of *liberum matrimonium* (*op. cit.* 102) cannot be accepted. The latter expression, when used in the sources, does not mean, as a specific and technical term, the marriage without *manus*. The main instance, *Cod. Just.* 8.38.2, merely uses the term to indicate the freedom of divorce, similarly *Cod. Just.* 5.4.14 and 5.4.5.6; *Cod. Just.* 5.17.2 also considers only the free dissolvability of the marriage. In view of these passages, the only instance to support Ehrhardt's opinion, that is, *Cod. Just.* 5.4.21 (as late as of A.D. 426), cannot be acknowledged as proof. The fact that originally only the free marriage could be dissolved freely by both of the spouses, certainly was no longer known to the authors of the sources quoted. Cf. also A. Manigk in Pauly-Wissowa *s.v.* "Manus" 1381.

[309] *Op. cit.* 90.

[310] *Op. cit.* 87 ff. Cf. also Ehrhardt, *op. cit.* 107[1].

Lond. 93 and the customs of some Oriental national group. But the uncertainty that nowadays exists with regard to the origin of our source [311] warns us to be cautious in our inferences about the localization of institutions dealt with in it. Furthermore, and this seems to me decisive, the fact that it is precisely the word παρρησία that has no corresponding term in the Syriac language, and therefore must have been taken untranslated from the Greek original text, markedly suggests that the marriage denoted by this expression had a Hellenistic origin. If the *Syro-Roman Lawbook* did originally refer to a Semitic sphere, I should assume that Hellenistic legal ideas had influenced the Semitic population, become fused with native wedding rites, and thus created the form of "free" marriage that we know from *Lond.* 93. This suggestion may find some support in the fact that *Dura Perg.* 22 testifies to the influence of the same Greek ideas on the Semitic population of at least one country.[312]

It is possible, to be sure, that in some regions the drawing up of instruments concerning dowry and nuptial gift was so firm a custom that it was held by people, not juridically trained, to be the constitutive element in contracting marriage. This might have provoked the rescript of Diocletian *Cod. Just.* 5.4.13. It must not be forgotten, however, that this is the earliest case, known to us, to occasion a polemic on the part of the imperial chancellery. In the case decided by Probus *Cod. Just.* 5.4.9 the (western?) questioner, Fortunatus, merely doubted the possibility of *proving* the lawfulness of his marriage and the legitimacy of his daughter—because he had neither drawn up *tabulae nuptiales* nor presented a birth return for the daughter.

[311] See the researches of C. A. Nallino in *Studi in onore di Pietro Bonfante* (Milano, Treves) I 210 ff., F. Kozman in *Acta Congressus Iuridici Internationalis* (Rome, Pont. Inst. Utr. Iur., 1935) II 173 ff., and E. Carusi, *ibid.* II 557 ff., whose conclusions differ very much from each other.

[312] This becomes clear from the Semitic names of the parties. Cf. for other legal matters, *Dura Perg.* 20, 21, 32; C. B. Welles, *Dura Report* VI (1936), 435, *Ztschr. Sav. St. Rom. Abt.* LVI (1936), 103, 125. Cf. also P. Koschaker, *Ztschr. Sav. St. Rom. Abt.* LI (1931), 429.

2. Yet there still seems to be something more. I venture to propose the hypothesis that provincial opinions to the effect that a document concerning dowry and nuptial gift was a necessary condition of lawful marriage arose in connection with the *donatio ante nuptias.* I believe that our previous inquiry has demonstrated that opinions like these were at home in the Oriental sphere rather than in the Greek sphere. The nuptial gift was taken over from Oriental laws also.[313] In view of the fact that the nuptial gift derived from the price that the bridegroom had to pay for the woman in the primitive purchase marriage,[314] it would not be surprising if the idea was prevalent that a lawful marriage depended on the constitution of a nuptial gift. The further step, to the idea that a written contract was necessary, would not be difficult, especially as, from Constantine, *Cod. Theod.* 3.5.1, on, the *donatio ante nuptias* had to be made in a public deed. A hint of this, no more, may be found in the dictum of *Cod. Theod.* 3.7.3 (*Cod. Just.* 5.4.22; Theodosius and Valentinian, A.D. 428): si donationum ante nuptias vel dotis instrumenta defuerint. The *donatio* apparently is regarded as the chief content of the instrument by those who believe ob id deesse recte alias inito matrimonio firmitatem.

Here it is a favorable circumstance that we are able to present two instances, coming from opposite parts of the Roman world, which are not far from establishing our hypothesis as a proved fact. The *Mishna* requires a gift to be made

[313] L. Mitteis, *Reichsrecht und Volksrecht,* 266 ff.; E. Rabel, *Grundzüge des römischen Privatrechts* in Holtzendorff-Kohler's *Enzyklopädie der Rechtswissenschaft* I (Munich, Duncker and Humblot, 1915), 515; P. Bonfante, *op. cit.* (see note 116) 382 f., 384[3]; and others. G. Vismara, in *Cristianesimo e diritto romano* (*Pubblicazioni della Università Cattolica,* Ser. II, XLIII, Milan, "Vita e Pensiero," 1935), believes in Jewish origin, but see A. Steinwenter, *Ztschr. Sav. St. Rom. Abt.* LVI (1936), 383.

[314] Mitteis, *op. cit.* 265; P. Koschaker, *Rechtsvergleichende Studien zur Gesetzgebung Hammurapis* (Leipzig, Veit, 1917), 162 f. with many further quotations), and *Ztschr. cit.* (see note 271), 85 f.; P. Bonfante, *op. cit.* 381; R. Monier, *Manuel élémentaire de droit romain* I (Paris, Domat-Montchrestien, 1934), 357. See also the interesting statements of Erdmann, *op. cit.* (see note 95) 217 ff.

by the man to his wife, if her status is to be distinguished from concubinage.[315] On the other hand, *Lex Romana Burgundionum* 37 [316] reads:

1. Nuptiae legitimae contrahuntur, si conventu parentum aut ingenuorum virorum intercurrente nuptiali donatione legitime celebrentur.

2. Quod si pares fuerint honestate personae, consensus perficit nuptias, sic tamen ut nuptialis donatio solenniter celebretur: aliter filii exinde nati legitimorum locum obtinere non poterint. . . .

Germanic origin of this rule,[317] assumed by the prevailing opinion, has recently been disputed by A. Lemaire,[318] but it may be deduced from the connection of the *nuptialis donatio* with the *conventus parentum aut ingenuorum virorum* which occurs in § 1. If, as the Visigothic king Ervig actually believed in A.D. 681 (*Lex Visig.* 3.1.9, *ed.* Zeumer p. 131,[319] see p. 101 f.), the function of the gift was merely to prove the *dignitas coniugii*, this connection would not have been suggested. Obviously we face, if not the Germanic *Akt im Ring* proper,[320] something very similar and following the same pattern.[321] It is true that the *parentes aut ingenui viri* apparently did not have to consent, as they must according to the Germanic law; and their attendance was required for the purpose of publicity only, but this, like the omission of the *conventus* in § 2,[322] does

[315] Mitteis, *op. cit.* 227.

[316] *Ed.* R. von Salis, *Monumenta Germaniae Historica, Leges* I (see Cl. v. Schwerin, *Quellen zur Geschichte der Eheschliessung* [Bonn, Marcus and Weber, 1925] I no. 88).

[317] For the general subject of Burgundian influences on the *L. Rom. Burg.*: P. Krüger, *Geschichte der Quellen und Literatur des römischen Rechts*[2] (Munich, Duncker and Humblot, 1912), 360.

[318] *Mélanges Paul Fournier* (Paris, Sirey, 1929), 422.

[319] See Schwerin, *op. cit.* no. 84.

[320] See H. Meyer, *Ztschr. Sav. St. Germ. Abt.* XLVII (1927), 217 ff., especially 222 ff.

[321] Lemaire, *op. cit.* 419, thinks that the enactment of 428 just mentioned might have been influential. But this enactment not only allows omission of both nuptial gift and dowry, but also requires the *fides amicorum* in case persons *equal* in social rank marry, whereas our rule does the contrary.

[322] Except for the requirement of the *donatio*, § 2 agrees in principle with the contemporary imperial law, see p. 91.

not surprise us in a law that simply dictated a Germanic legal form to a non-Germanic population.

Thus the *nuptialis donatio* of *Lex Rom. Burg.* 37 must derive directly from the primitive Germanic idea of marriage as a kind of purchase. Lemaire's argument, drawn from the fact that a *dos* given by the man to his wife is not mentioned in the Germanic Burgundian law, is inconclusive. This circumstance is due to the fact that in *Lex Burg.* 66, 69, 86 the *wittimon* is still considered as a real consideration to be paid to the person, or to the *sippe*, who has the power over the bride.[323] Moreover, it is precisely the manner in which § 2—characteristically differing from Ervig's reasoning, almost two centuries later [324]—grafts the requirement of the gift upon the postclassical Roman principle, apparently misunderstood, of *consensus facit nuptias*, that proves our view. This origin of the *nuptialis donatio* of *Lex Rom. Burg.* 37, obviously known to the authors of the law, explains why it is an essential feature of lawful marriage.

3. There is no trace of ideas like these in imperial enactments.[325] The marriage document is called either *dotalia* [326] or *nuptialia* [327] *instrumenta*, in Greek either προικῷα [328] or γαμικά [329]

[323] It would mean nothing in favor of Lemaire's opinion, if, as he believes, *op. cit.* 420 f., the use, made in Latin sources of Germanic law, of *dos* to denote the property conveyed to the woman by her husband on the occasion of the marriage should be derived from the Patristic literature which uses the expression with reference to gifts the Church received from her "bridegroom" Christ. Any influence of this sort on *L. Rom. Burg.* 37 is excluded by the fact that it correctly speaks of *nuptialis donatio*, and not of *dos*.

[324] As to the time of *L. Rom. Burg.*, see Krüger, *op. cit.* (see note 316).

[325] In the Greek papyri of Egypt the ἔδνα are not mentioned before the fourth century, see Mitteis, Grundzüge 225.

[326] *Cod. Theod.* 9.42.15 (*Cod. Just.* 9.49.9 *pr.*); *Cod. Just.* 2.7.23.4; 4.30.14.1; 5.4.23.1a, 5a, 7; 5.17.11 *pr.*; 5.27.6 *pr.*; 5.27.10 *pr.*, 1, 3; 5.27.11 *pr.*, 2, 3; 7.6.1.9. Cf. *Thesaurus linguae Latinae s.v.* "Dotalis" B.

[327] *Cod. Just.* 5.27.10 *pr.*; 5.27.11 *pr.*

[328] *Nov.* 12.4; 18.11; 22.3, 11, 18; 78.3; 89.1.1; 89.8 *pr.*, 1; 89.9; and others. *P. Lond.* V 1676.10 (A.D. 566–573): προικιμαῖον συμβόλαιον. Isolated *Nov.* 74.4.2: προικὸς ἢ προγαμιαίας δωρεᾶς . . . συμβόλαιον.

[329] *Cod. Just.* 1.4.33.2; *Nov.* 18.11; 74.4 *pr.* (cf. § 1: γάμων συμβόλαια); 78.3; *CPR.* 30 (Mitteis, *Chrest.* 290, sixth cent. A.D.) col. I 6 f., II 28: γαμικὰ καὶ προικῷα συμβόλαια.

(συμβόλαια); and actually the emperors considered the *dos* rather than the *donatio*. Justinian, *Cod. Just.* 5.3.20.5, does not see any difficulty in the circumstance that only the *dos*, but not the *donatio*, is constituted.[330] The secondary importance of the nuptial gift also becomes evident from *Cod. Just.* 5.27.10 (Justinian, A.D. 529): in § 2 the emperor says: qui postea vel donationem vel dotem conscripsit, but in *pr.* §§ 1 and 3 he merely makes mention of *dotalia instrumenta*.[331] In the Byzantine-Roman legal system, therefore, the bridal gift had been completely removed from its original basis, and had become a simple additional element within the marriage property law which was still founded on the Roman dotal system. Even *Nov. Maior.* 6.9 (A.D. 458), which made both *dos* and *donatio* obligatory in the Western Empire, considered the dowry rather than the gift.[332]

When late emperors, although, down to Justinian, they constantly upheld the maxim that the constitutive element in contracting marriage is the marital intent with no formal requirement, whether of dowry or dowry contract, nevertheless made the lawfulness of a union depend upon the drawing up of such a document in some cases,[333] they were moved by reasons very different from those just considered. As Ehrhardt has well observed,[334] they only wanted to avoid doubts as to the *affectio maritalis*. Therefore a document as a rule was required when the social rank of one of the parties gave rise to the presumption that marriage was not intended, but merely concubinage; note for example Justin *Cod. Just.* 5.4.23.1a, 5a, or Justinian *Nov.* 78.3. Even the famous *Nov.* 74.4 with its various formalities for the marriages of the higher classes—constitution of both dowry and bridal gift for the

[330] Mitteis, *Reichsrecht und Volksrecht* 291.

[331] Cf. *Cod. Just.* 5.27.11.1: post *dotem* conscriptam; Nov. 18.4: *προῖκα μὲν γὰρ ἀποτελεῖ, γάμον δὲ προῖκες οὐ ποιοῦσιν.*

[332] Mitteis, *op. cit.* 294[1].

[333] Bonfante, *op. cit.* 194.

[334] *Op. cit.* 99 f., also 96 f. Cf. Brassloff, *op. cit.* 78; Arangio-Ruiz, *op. cit.* 83; Petropoulos, *Acad. Athens* VI (1931), 131; Rage-Brocard, *op. cit.* (see note 267) 121 ff.

upper society including the *illustres* (§ 1), and an ecclesiastical ceremony with entry in the registry of the church for the middle classes (§ 2)—had as its purpose the provision of undoubted evidence of the marital intention (*pr.*); it was the fact that fraudulent evidence had frequently been given as to the intention of people who had sexual relations that induced the rule.[335]

The only enactment that made the marriage dependent on the constitution of both gift and dowry *per se* (*i.e.* not for the purpose of providing evidence of intent) and with it on a written contract, is the isolated[336] *Nov. Maior.* 6.9 of 458. But, as we have just seen, this statute dealt chiefly with the *dos*, whose succession to the descendants it aimed to secure: et quia studiose tractatur a nobis utilitas filiorum . . . putavimus praecavendum . . . ut numquam minorem quam exigit futura uxor sponsaliciam largitatem dotis titulo se noverit conlaturam. It was in no way influenced by the reasoning which produced either Oriental or Germanic opinions as to the necessity of agreements about a nuptial gift. Mitteis' charge that imperial legislation succumbed in this case to eastern provincial ideas is not justified.

II. Thus the tendency, obviously existing in the Byzantine legislation of the sixth century, and culminating in *Nov.* 74.4, to submerge the traditional Roman principle that marriage could be contracted without any formality, did not emanate from eastern legal ideas. Furthermore it may be observed that it is due to a development, direct and untouched by alien influences except for certain Christian ideas, from conceptions that spring from classical Roman law.

[335] In 426 the emperors Theodosius and Valentinian seem to have made an analogous distinction among their subjects. In *Cod. Just.* 5.4.21 marrying soldiers *a caligato milite usque ad protectoris personam* are exempted from any formality, and hence we may conclude that other people had to observe some solemnity. Cf. also *Cod. Theod.* 4.6.7: naturali[um his no]men sancimus imponi quos sine honesta cele[bratione] matrimonii procreatos legitima coniunctio fud[erit in lu]cem. The reasons for the enactment cannot be determined. As shown by *Cod. Just.* 5.4.22, it seems to have been abolished very soon.

[336] Mitteis, *Reichsrecht und Volksrecht* 228; Ehrhardt, *op. cit.* 98.

1. Decades ago B. Kübler pointed out that passages of the Digest which make the intention of the spouses the only criterion of the marriage are due to interpolations;[337] and to E. Levy[338] we owe the demonstration of the fact that, in the mind of the classic jurisconsults, the question whether or not a matrimonial relation existed was a question of actual fact rather than of mere intention. But this does not mean that the importance of the subjective element was unknown to the Romans.[339] Consent was an indispensable condition of the validity of the marriage. Only to differentiate the marriage from other sexual relations, or to decide whether divorce had occurred, did they pay attention, exclusively or by preference, to the actual character of the relations which existed between the parties (and on occasion to the form employed in effecting union).[340] This was because the marital inclination could be held to be beyond doubt, and therefore needed no special attention, when people to whom marriage was permitted,

[337] *Zeitschr. Sav. St. Rom. Abt.* XI (1890), 49. Cf. Brassloff, *op. cit.* 77; E. Levy, *Herg. der röm. Ehescheid.* 70[5]; F. Pringsheim, *Gnomon* III (1927), 520; E. Albertario, *Rendiconti del R. Istituto Lombardo* LXII (1929), 809 f.; and others. See *Dig.* 24.1.32.13; 35.1.15; 50.17.30; 24.1.66 *pr.*, with *Index Interpolationum* (Weimar, Böhlau, 1929–1935), *ad loca*. The maxim: *Nuptias non concubitus, sed consensus facit* was recently believed by Rage-Brocard, *op. cit.* (see note 267) 91[1], 103 f., to be genuine in *Dig.* 50.17.30 (cf. also Bonfante, *op. cit.* 190; U. Brasiello, *Archiv. Giur.* XCVIII [1929], 245). But, as will be shown on p. 98, the idea apparently is Christian; cf. Levy, *op. cit.;* F. Pringsheim, *Law Quart. Rev.* XLIX (1933), 400. Rage-Brocard unplausibly cites *Dig.* 23.1.11 and 49.15.14.1. In the first of these two passages G. v. Beseler, *Ztschr. Sav. St. Rom. Abt.* XLV (1925), 468, justly athetizes: [sponsalia . . . et ideo]; the second sentence really is not a consequence of the first, cf. also Levy, *op. cit.* 75[4]. In the second passage the words [sed consensu redintegratur matrimonium] cannot have been written by Pomponius, because the restoration of the marriage, according to the classic law, depends on the resumption of the joint life, and not on mere consent.

[338] *Op. cit.* 70 ff.

[339] Cf. Bonfante, *Op. cit.* 188; Albertario, *op. cit.*; A. Ehrhardt in Pauly-Wissowa, *s.v.* "Nuptiae" (p. 1 col. 2 of the reprint).—See also the question asked by the republican censor (Gell. 4.20.3): ut tu ex animi tui sententia uxorem habes?

[340] Apul. *apol.* 88; *met.* 6.9. Ehrhardt in Pauly-Wissowa *loc. cit.* (p. 2 col. 2 of the reprint).

formed a union or looked upon each other in the usual way of husband and wife.[341]

Yet late in the classic period some change took place. Application of a purely objective test did not cause difficulties, inasmuch as the only distinction to be considered was that between marriage and *stuprum*, since concubinage was limited to relations between those persons whose marriages were prohibited by the *lex Julia et Papia*, and to relations between *patronus* and *liberta*. Definition became more difficult, however, from the moment when *concubinatus* was held to be possible between persons who were equal in social rank, and who were allowed to marry. Late in the second century, or early in the third, this was actually held by prominent jurists.[342] Papinian, *Dig.* 34.9.16.1,[343] and Paul, *Dig.* 34.2.35 *pr.*,[344] knew of *concubinatus* with *mulieres ingenuae et honestae*.[345] In a legal system which did not require any ceremony[346] or formality to distinguish lawful marriages from other quasi-matrimonial unions which, like marriage, were persistent and exclusive, at least as a rule, and were not condemned by morality or the penal law, such a distinction must rest on the intention of the people concerned, especially when the conversion of concubinage into marriage was in question, as it was in *Dig.* 39.5.31 *pr.* (*fr. Vat.* 253b).[347]

[341] Cf. Levy, *op. cit.* 75.

[342] Monier, *op. cit.* (see note 314), 366 f.; Ehrhardt in Pauly-Wissowa *loc. cit.* (p. 2 col. 2 of the reprint). The book of Plassard, *Le concubinat romain sous le Haut-Empire* (1921), quoted by Monier, is not available to me.

[343] Mitteis, *Ztschr. Sav. St. Rom. Abt.* XXIII (1902), 304 ff.

[344] P. Meyer, *Der römische Konkubinat* (Leipzig, Teubner, 1895), 71.

[345] Bonfante's assertion, *op. cit.* 234, that a concubinage with women freeborn and decorous was not permitted before Justinian, conflicts with the sources just quoted.

[346] See note 267.

[347] This could happen, e.g., when a magistrate who had taken a woman from his province retired from his office, *Dig.* 23.2.65.1; *Cod. Just.* 5.4.6, or in a union of senator with a freedwoman when he lost his dignity, *Dig.* 23.2.27. When *ipso iure* convalescence of such a union was assumed, our problem did not arise, of course.

Thus it does not surprise us that it was precisely Papinian and Paul who positively considered the intention of the parties. Papinian did so in *Dig.* 39.5.31 *pr.*[348] Under the name of Paul there are two passages which give the same impression:

Sent. 2.20.1. Eo tempore quo quis uxorem habet concubinam habere non potest. concubina igitur ab uxore solo dilectu separatur.

Dig. 25.7.4; *libro* 19 *resp.* Concubinam ex sola animi destinatione aestimari oportet.

It is true that neither of these passages is perfectly reliable as a statement of classic law. As regards the first, Paul's authorship is excluded [348a] by the mere fact that the *Sentences* is not a classical work.[349] The second does not seem to give the original Pauline text either, but only a résumé.[350] Nevertheless, in my opinion, we may put trust in them to this extent, that they testify that Paul in some sense took cognizance of the intention of the parties, although the compiler of the *Sentences*, as well as Tribonian, may have improperly generalized his view. The double ascription of the same view to the same jurist, made by two compilations as distant from one another as were the *Sentences* and the *Digest*, affords a good deal of probability, especially as it is a possible assumption that the so-called *Sentences* of Paul are chiefly an extract from that jurist's works made as early as the last years of the third century.[351] Our conclusion is supported by the *respon-*

[348] Its genuineness (except for the last sentence), denied by some authors (see *Index Interpolationum ad loc.*), is proved by *Fr. Vat.* 253b, Bonfante, *op. cit.* 190 f.; Rage-Brocard, *op. cit.* 104[6], 110; A. Ehrhardt, *Ztschr. Sav. St. Rom. Abt.* LVII (1937), 346. F. Pringsheim's interpretation (*Law Quart. Rev.* XLIX [1933], 400), that only the outward form, but not the internal will is considered by Papinian, is too restrictive in my opinion.

[348a] See the authors quoted by E. Volterra, *Rivista di storia di diritto italiano* VIII (1935), p. 19 of the reprint.

[349] Quotations given by W. Felgentraeger in *Symb. Frib.* (see note 1) 368 f.

[350] Cf. E. Albertario, *Rendiconti del R. Istituto Lombardo* LXII (1929), 817.

[351] E. Levy, *Ztschr. Sav. St. Rom. Abt.* L (1930), 294; G. Scherillo in *Studi in onore di Salvatore Riccobono* I 68 f.

sum attributed to Paul in *Dig.* 23.2.65.1 : si in eadem voluntate perseverat.[352]

It is true that Papinian's and Paul's opinion was not the common opinion. Ulpian maintained a more conservative position ;[353] note *Dig.* 25.7.1.1 (2 *ad leg. Jul. et Pap.*) :

> Cum Atilicino sentio et puto solas eas in concubinatu habere posse sine metu criminis, in quas stuprum non committitur.

Ulpian, unlike teacher and co-disciple, did not recognize concubinage with a *mulier ingenua et honesta*, and that meant simultaneously that he used exclusively the objective criterion for delimiting concubinage and marriage. Actually, the two passages in which Ulpian emphasizes the marital intent are obviously interpolated. In *Dig.* 24.1.3.1[354] Severus' decree merely arose from the fact that marriage between senator and *liberta* was prohibited. In *Dig.* 48.20.5.1 interpolation has been demonstrated by H. Krüger.[355] Very close to Ulpian's opinion was that of Marcian,[356] while Modestinus[357]

[352] It is true that the passage does not give the original words of Paul, cf. G. v. Beseler, *Ztschr. Sav. St. Rom. Abt.* XLV (1925), 469, and it might well have been inserted here by the compilers on the ground of *Cod. Just.* 5.4.6. But this rescript proves Paul's authorship as to the *responsum* itself.

[353] For this reason *Dig.* 48.5.14(13).6 was not quoted on p. 94, and *Dig.* 24.1.58 *pr.*, 1 also were omitted for similar reasons. It is unlikely that Scaevola had already paid attention to the subjective element. Cf. note 347, last sentence.

[354] Cf. *Index Interpolationum ad locum.* I believe the whole termination ([quia . . . concubina]) to have been interpolated.

[355] *Ztschr. Sav. St. Rom. Abt.* XIX (1898), 23. Cf. *Index Interpolationum ad loc.*

[356] *Dig.* 25.7.3 *pr.* Among the various suggestions made as to the emendation of the text (see *Index Interpolationum ad loc.*) I prefer that of Albertario, *op. cit.* 813.

[357] *Dig.* 23.2.24: In [liberae] <ingenuae> (see *Index Interpolationum ad locum*) mulieris consuetudine non concubinatus, sed nuptiae intellegendae sunt, si non corpore quaestum fecerit. To Seckel's translation of *consuetudo* by "intercourse" (*Handlexikon zu den Quellen des römischen Rechts*[9] [Jena, Fischer, 1907], 100) I should prefer here that of "habit" which harmonizes better with the preterite form *fecerit*, as well as with *nuptiae*; this word regularly means "contracting marriage" rather than "marriage." It is true that in *Dig.* 48.5.35 *pr.* the words "excepta videlicet

was perhaps on the side of Papinian and Paul. However this may be, it is proved that the matter was in his time a moot point by Ulpian's own words, characteristically reserved, in *Dig.* 25.7.1.1: sentio et puto.[358] At any rate, in the imperial chancellery of the third century Paul has prevailed, as is proved by Gordian *Cod. Just.* 5.4.6.

If there was among the latest classical jurists a tendency to pay more attention to the *affectio maritalis*, they were nevertheless far from the extremely subjective criterion of postclassical legislation.[359] Typical signs[360] were still considered first. An autem maritalis honor et affectio pridem praecesserit, personis comparatis, vitae coniunctione considerata, perpendendum esse, says Papinian in *Dig.* 39.5.31 *pr.* It was a change of attitude rather than of actual prescriptions. Particularly, in contrast with the practice of a later period (see *Cod. Theod.* 7.13.6 *pr.*), the principle that marriage required actual union, or at least entrance into her husband's house by the woman, was not given up.[361] But it was the point from which the postclassical idea could start.

2. Christian influences, in addition to the general *favor animi* of the epoch,[362] were the motive power in the develop-

concubina" were not written by Modestinus (Kübler, *Ztschr. Sav. St. Rom. Abt.* XIII [1892], 361; G. Castelli, *Scritti Giuridici* [Milan, 1923], 144 f.; Bonfante, *op. cit.* 235), but they might well replace his arguments. No definite decision is possible.

[358] Once even Ulpian seems to approach Papinian; note *Dig.* 48.5.14(13).4: ea quae, quamvis uxoris animo haberetur, uxor tamen esse non potest. But a real abandonment of the objective viewpoint is not implied in these words.

[359] *Cod. Just.* 5.17.8 *pr.* (A.D. 449): consensu licita matrimonia posse contrahi; 5.4.26.1 (A.D. 530): si enim ex adfectu omnes introducuntur nuptiae; and others. Cf. Ehrhardt, *op. cit.* (see note 294), 99. Practical consequences in *Cod. Theod.* 7.13.6 *pr.* (A.D. 370), see Levy, *Herg. d. röm. Ehescheid.* 103[5], and in *Cod. Just.* 5.5.8 (A.D. 475). Cf. Gai. *epit.* 4 *pr.*

[360] Levy, *op. cit.* 75; Albertario, *op. cit.*; Rage-Brocard, *op. cit.* 112.

[361] Hence I do not agree with Ehrhardt in Pauly-Wissowa, *s.v.* "Nuptiae" (p. 3 col. 1 of the reprint) who believes, despite the interpolation of *Dig.* 25.7.3 *pr.*, which he accepts, that concubinage, in classic times, was contracted by drawing up an instrument.

[362] Cf. W. Kunkel, *Römisches Privatrecht* (Berlin, Springer, 1935), 83; V. Arangio-Ruiz, *Istituzioni di diritto romano*[3] (Naples, Jovene, 1934), 94 f.

ment of the postclassical idea.[363] Tertullian, as well as Augustine, paid attention exclusively to the element of intent when dealing with marriage questions. Their doctrine did not result from juridical considerations,[364] but from the Christian idea of the ethical character of the marriage; and this obviously caused the extreme radicalism of their view. Tertullian emphasized the idea that marriage is a union of souls in arguing that it is indissoluble even by death;[365] and Augustine deduced from the spiritual nature of marriage that sexual relations are irrelevant.[366] Yet such Christian ideas, as in other cases,[367] reacted upon the postclassical legal conception of marriage[368] in theory as well as in practice.[369] Especially is Augustine's influence obvious. It appears likely that the dictum: Nuptias non concubitus, sed consensus facit (*Dig.* 50.17.30) was drawn directly from his formulation.[370]

On this soil the demand for an undoubted indication of marital intent grew and became urgent when in the sixth century all prohibition of marriages between *personae honestate*

[363] Cf. Ehrhardt in *Symb. Frib.* (see note 1) 101; also Levy, *op. cit.* 70[5], 96[1], 103[1, 5]; P. E. Corbett, *op. cit.* (see note 93) 94[1]; A. Beck, *Römisches Recht bei Tertullian und Cyprian* (*Schriften der Königsberger Gelehrten Gesellschaft, Geisteswiss. Klasse*, VII 2, Halle, Niemeyer, 1930), 97[71][4].

[364] This is disregarded by J. Peters, *Die Ehe nach der Lehre des hl. Augustin* (*Veröffentlichungen der Görresgesellschaft, Sekt. für Rechts- und Sozialwiss.* XXXII, Paderborn, Schöningh, 1918), 3 f. Cf. also Levy, *op. cit.* 103[1].

[365] See particularly *De monog.* 10 *in fine* (Oehler I 777), with Levy, *op. cit.* 103[1], and Beck, *op. cit.* (see note 363), 98 [72].

[366] Peters, *op. cit.* (see note 364), 4 ff. (see also D. Nonnoi, *Riv. ital. sci. giur.* N.S. IX (1934) 558 ff.

[367] Cf. E. Levy in *Gedächtnisschrift für Emil Seckel* (*Abh. aus der Berliner Juristischen Fakultät* IV; Berlin, Springer, 1927), 145 ff.

[368] It would not be irrelevant in this connection, if Tertullian were identical with the jurisconsult of the same name, as was recently suggested again by Beck, *op. cit.* 39 [13] ff. (seriously doubted by A. Steinwenter, *Ztschr. Sav. St. Rom. Abt.* LII [1932], 413 ff.).

[369] See note 359.

[370] See *Serm.* 51.21: quasi uxorem libido faciat et non caritas coniugalis. —Other Augustinian influences on Justinian's marriage law were pointed out by E. Albertario, *Rivista di filosofia neoscolastica* XXIII (1931), 369 (quoted by Nonnoi, not available to me).

impares was abolished (*Cod. Just.* 5.4.23.1a, 5a, 7), and again when eventually Justinian transformed concubinage into a quasi-matrimonial legal relation accessible to everybody.[371] Naturally the intention was shown particularly by constitution of dowry and nuptial gift, and by the drawing up of *tabulae nuptiales*, which had already been common, although not legally required, in classical times.[372]

And even here ecclesiastical influences were active.[373] Several times Augustine emphasizes the importance of the *tabulae matrimoniales;*[374] and in one instance (*Serm.* 332.4) he specifically mentions the signing by the bishop of the *tabulae.* This last fact shows that, in the eyes of the authorities of the Church, the drawing up of the document must have had particular importance; and it seems unlikely that Augustine laid as little stress on it as Ehrhardt supposes.[375] It is highly significant that the instrument considered by Augustine is the regular document about marriage and dowry of the classic Roman law. The Father of the Church especially relies on the clause: *liberorum procreandorum causa* that belongs to the common content of the *tabulae matrimoniales* considered by him.[376] It is precisely this clause (occasioned by the *lex Julia de maritandis ordinibus?*) that seems to be a characteristic of Roman marriage-documents. In *P. Mich. inv.* 508 (*Aegyptus* XVII [1937] 477;[376a] first or second century A.D.) we read:

[. . . . .]s Nomissianus filiam suam virginem [. . . . . secundum le-]

[371] Bonfante, *op. cit.* 234 ff.

[372] Ehrhardt in Pauly-Wissowa, *s.v.* "Nuptiae" (p. 4 col. 2 of the reprint), who gives further quotations.

[373] Cf. Rage-Brocard, *op. cit.* 121 f.

[374] Peters, *op. cit.* 13.

[375] Pauly-Wissowa, *s.v.* "Nuptiae" (p. 5 col. 1 of the reprint). His opinion hardly agrees with his own statement in *Symb. Frib.* 94[3].

[376] *Serm.* 51.22; 278.9. See Peters, *op. cit.* 13.

[376a] The text has now been completed by *P. Mich. inv.* 2217 and will be re-edited by H. A. Sanders in *Trans. Amer. Philol. Ass.* LXIX (1938). As far as the text as rendered above differs from my earlier edition, I am now following Professor Sanders' edition. I have doubts, however, about his reading *eram* instead of *eam* in line 3, and if his deciphering is right, the word should in my opinion still be read *e{r}am.*

[gem Iuliam] quae de maritandis ordinibus lat[a est liberorum pro-]
[creando]rum causa in matrimonio eam collo[cavit]

In the same manner the approximately contemporary *PSI.* VI 730 was drafted (lines 1 ff.):

M. Antonius Marcellus [e]q[ues(?) dedit(?) Anto(?)-]
niam Thaisarion filiam s[uam virginem(?), secundum legem Iuliam quae de maritandis]
ordinibus lata est[377] libero[um[378] procreandorum causa in matrimonio eam collocavit]

Next an agreement about the constitution of a *dos* follows, and what follows in *P. Mich. inv.* 508 + 2217 also refers to the dowry. Actually the dowry agreement was considered as the chief content of the instrument; and the Roman jurists called the latter: *tabulae dotales*, *tabulae dotis*.[379]

There cannot be any doubt that it was this kind of document to which Augustine alludes.[380]

3. The importance of the constitution of a *dos* for the purpose of differentiating lawful marriage from concubinage, in *western* legal ideas, both ecclesiastical as well as secular, needs no further demonstration. Lemaire, in his study repeatedly mentioned, has shown the diffusion and the central position of the Leonine epistle, to be quoted immediately, in the Canonic evolution down to the *Decretum Gratiani*. H. Meyer[381] has also called our attention to the efforts of the Church to make every marriage dependent upon a "dotal" arrangement. L. Mitteis[382] has hinted at the effective in-

[377] The reference to the *lex Iulia* has already been noted by the editor, Schiaparelli.

[378] Arangio-Ruiz, quoted by Schiaparelli, supposed some allusion to the *ius liberorum*. But both a comparison with *P. Mich. inv.* 508.3, as well as the Augustinian instances, make our restoration secure. Libero[rum procreandorum causa was already suggested by P. M. Meyer, *Ztschr. f. vgl. Rechtswiss.* XXXIX (1921), 230.

[379] Scaev. *Dig.* 23.4.29 *pr.*; 24.1.66 *pr.*; 33.4.12.

[380] Cf. also Aug. *gen. ad litt.* 11.41: nisi forte erat a patre tradenda et expectanda erat votorum solemnitas et convicii celebritas et dotis aestimatio et conscriptio tabularum.

[381] *Ztschr. Sav. St. Germ. Abt.* XLVII (1927), 235, 235[4].

[382] *Reichsrecht und Volksrecht* 228 f.

fluence of *Nov. Maior.* 6.9, despite its abolition by the emperor Severus in 463, *Nov. Sev.* 1, in medieval Germanic laws.

But here a sharp distinction must be made. As far as secular law was concerned, this evolution was no doubt due to Germanic ideas that arose from the conception of marriage as a kind of purchase; and Germanic legal sources written in Latin use the word *dos* to denote the property conveyed to the woman by her husband on the occasion of the marriage. Other ideas, however, were operative on the side of the Church. Juridical opinions given, and allusions made to legal matters, in the patristic literature, were based on the conceptions of the Roman law; *dos* means primarily the Roman *dos*. To some extent *Nov. Maior.* 6.9, as a positive enactment, may have been influential,[383] for example, when in 458 or 459[384] Pope Leo the Great emphasized the importance of the constitution of a dowry, along with other requirements, for the purpose of constituting a lawful marriage.[385] The fact, however, that ecclesiastical efforts to make the lawfulness of a marriage dependent on the constitution of a dowry, and incidentally on drawing up the pertinent document, were due above all to a desire for a clear manifestation of the marital intention, is fully proved by the law of Ervig, cited on p. 89, which was drafted under the influence of ecclesiastical ideas,[386] and is accurately defined by its misunderstanding of the Germanic idea that really must have induced the rule:

> Ne sine dote coniugium fiat . . . nuptiarum opus in hoc dinoscitur habere dignitatis nobile decus, si dotalium scripturarum hoc evidens praecesserit munus. nam ubi dos nec data est nec conscripta, quod testimonium esse poterit in coniugii dignitate futura,

[383] A. Lemaire, *op. cit.* (see note 318), 417.

[384] Lemaire, *op. cit.*

[385] *Epist.* Leonis Magni 167.4 (Migne, *Patrologia Latina* LIV 1205): Igitur cuiuslibet loci clericus, si filiam suam viro habenti concubinam in matrimonium dederit, non ita accipiendum est quasi eam coniugato dederit, nisi forte illa mulier et ingenua facta et dotata legitime et publicis nuptiis honesta videatur.

[386] This has been demonstrated by Lemaire, *op. cit.* 421[27].

quando nec coniunctionem celebratam publica roborat dignitas, nec dotalium tabularum hanc comitatur honestas? . . .

In so far as Christian authorities required a dowry agreement and a document, they were by no means in conflict with the principle of *consensus facit nuptias*.[387] On the contrary, they were drawing a conclusion from it. But in the legal evolution that took place in the early Middle Ages in the western parts of the former Roman Empire, those ecclesiastical ideas and Germanic conceptions fused with and reacted upon each other.[388] This historical process certainly was favored by the conceptional confusion which had been caused by the change of the meaning of the word *dos*.[389]

III. It has already been remarked by some authors that the difference between the two principles, one requiring a written contract about dowry and nuptial gift as the necessary condition of lawful marriage, and the other not, did not mean a difference between legal ideas dominant either in the East

[387] Incompatibility of the written contract with this principle is supposed by Ehrhardt, *Symb. Frib.* 101.

[388] Benedictus Levita 3.463 (*Monumenta Germaniae Historica, Leges* II 132; von Schwerin, *op. cit.* [see note 316] no. 72): Decretum est, ut uxor legitime viro coniungatur. Aliter enim legitimum, ut a patribus accepimus et a sanctis apostolis eorumque successoribus traditum invenimus, non fit coniugium, nisi ab his qui super ipsam feminam dominationem habere videntur; et a quibus custoditur, uxor petatur et a parentibus propinquioribus sponsetur et *legibus dotetur*, et suo tempore sacerdotaliter, ut mos est, cum precibus et oblationibus a sacerdote benedicatur, et a paranimfis, ut consuetudo docet, custodita, et sociata a proximis, et tempore congruo petita legibus detur et solemniter accipiatur. . . . H. Meyer, *op. cit.* 234 f., links the insistence by the Church upon the dotal arrangement (here in the Roman sense) with the idea that the husband has to be the master of his wife, drawn by the Christian writers from the Scriptures. In view of the fact that the ecclesiastical doctrines had developed in the environment of the Roman law, which in those times only knew the free marriage, this cannot have been the original idea. But the passage is an interesting instance of the fusion of ideas as indicated above.—As to the possible original association of the idea of dowry with that of purchase marriage, which here also might be of some importance, see P. Koschaker, *Ztschr. f. ausl. u. internat. Privatrecht* XI (1937), Sonderheft 87[2].

[389] As to the ecclesiastical literature, especially the *dotes Ecclesiae*, see Lemaire, *op. cit.* 420.

or in the West of the Roman Empire.[390] I hope that our inquiry has revealed its background: Both in East and West documentation was required by those national groups whose marriage law was founded on the system of the nuptial gift, and thus in the last analysis still connected with the idea of a purchase.[391] But the same requirement arose from an opposite point of departure, that is, the need of obtaining definite evidence of the marital intent. It was the Church, since this was the most radical upholder of the merely intentional character of the marriage, and did not admit social inequality as a reason for prohibiting marriage,[392] that made this demand. For a long time the imperial legislation resisted both of these conceptions, maintaining the principle that consent was the only constitutive element in contracting marriage, and not requiring any formal evidence of this consent. Only in the sixth century, after the social basis of concubinage had been abolished and its nature had changed, did the legislation of Justin and Justinian approach, without abandoning the old principle, the standpoint of the Church, and that too only in special cases.[393]

[390] C. A. Nallino, *Rivista degli studi orientali* x (1923), 66 f.; Ehrhardt, *Symb. Frib.* 106.

[391] I disregard here *Nov. Maior.* 6.9, that was an inorganic addition to the Roman legal system, and based on special reasons.

[392] Peters, *op. cit.* 31 f.

[393] It is true that Justinian positively contrasted the mere reciprocal intention with the constitution of a dowry and with the drawing up of a document; *Nov.* 18.4: *γάμον δὲ προῖκες οὐ ποιοῦσιν ἀλλ' ἡ τῶν συνοικούντων ἀμοιβαία διάθεσις*; *Nov.* 22.3: *γάμον μὲν οὖν διάθεσις ἀμοιβαία ποιεῖ, τῆς τῶν προικῴων οὐκ ἐπιδεομένη προσθήκης*; and other instances, see Ehrhardt, *op. cit.* 99[2]. Cf. also Theodosius and Valentinian *Cod. Just.* 5.17.8 *pr.* But this does not conflict with the fact that such a document could be required as the only and indispensable means of *manifesting* the intention that always was held to be the constitutive element. Actually therefore Justinian found no dogmatic difficulty in doing so.

APPENDIX

P. Berol. 16121

With the permission of Professor Wilhelm Schubart, I publish the following papyrus of the Berlin Collection. I am greatly indebted to W. Schubart for reëxamining the original, correcting some of my readings and giving me advice and suggestions as to the restoration and interpretation of the text. Only the most important of these can be indicated here.

The papyrus consists of three disconnected fragments, assembled by Dr. Hugo Ibscher from a cartonnage from Abousir-el-malaq. The size of Fragment III is 37 cm. in greatest height, and 23.5 cm. in width, with a space of about 1 cm. between col. I and II. In so far as the hypothetical restorations of the left margin of col. I allow an opinion, col. I originally was a little wider than col. II. The writing is a cursive of the later Ptolemaic period; for its approximate date see note 410. The provenience of the papyrus is unknown.

Fragment III col. I is traversed by a line of juncture that is lacking in Fragment I. Therefore the latter must belong to a foregoing column, so that we have to reckon with a total length of the document of at least three columns.

The small Fragment II is impossible to locate within the whole, but no doubt it belongs to the same document.

Fragment I

[. . . . .]ω̣ν̣[
[. . . . . Π]τ]ο̣λεμ[αι
[. . . . .]τ̣ο̣ν ε[
[. . . . .]μεν . . π̣[. . .] . .[
[. . . . .]ἔστωι τὰ ἑ[κα]τέρου ὑπ[άρχοντα
[τ]ῶν δα̣[. . . . .] . ε̣κ̣νων ἀρο̣υ̣ρῶν ηκ[κληρονο-?]
[μ]εῖν ἢ καὶ πάραλαβεῖν τὸν πατρικὸν [κλῆρον

[..]ων ἐὰν μὲν Ζώσιον πρότερ[ον συμβῇ τελευτῆσαι
[..].την μίαν ἀνδρασιν ετ[...].[
[..]ην περι.[.....]ωι εἰληφ.[
[.....]...[.....]κυριο.[

NOTES

5. ὑπόδικα] ἔστωι τὰ ἑ[κα]τέρου (*scil.* Nearchos and Asclepiades). Another thinkable restoration might be: κοινὰ] ἔστωι, which would refer to a marital κοινωνία. But this seems to me less likely than the first possibility. Literally taken, it would mean actual joint property, whereas, as shown by Mitteis, *Grundzüge* 227, the wife had only a right of consent to dispositions of property made by the man.

8. Restored by Schubart.

9. Also possible ἀναβασιν, Schubart.

Fragment II

]..α.[
]πατρικ[
]σει μ[
]ων ετ[
]....[

Fragment III

Col. I

]ν
]ση
[.....]πα[τ]ρ[..]αὐτῶν.[.....
.....]οις
[.....ἀπο]δότωι Νέαρχος τῶι τῆς [δεῖνος πατρὶ Ζωσίωι, ἐὰν δὲ μὴ πε]ριῇ, τοῖς
[κληρονόμοις τοῦ Ζω]σίου ἀπὸ τῆς φερνῆς χ[αλκοῦ τάλαντα .....ἐν ἡμέραις ἑξ]ήκον-
[τα ἀφ' ἧς ἐὰν ἡμέρα]ς ἀπαιτηθῇ, τοῦ δὲ λοιποῦ ἀπολε[λύσθω. ἐὰν δὲ μὴ ἀποδῶι....]ωι
[.....]ἐὰν δ[ὲ] Νέαρχος πρότερος τελευτήσῃ περιόν[τος Ἀσκληπιάδου,]
[ἀποδότωι Ἀσκληπιάδης ἀπ]ὸ τῆς φερνῆς τάλαντ[α.....
.....]

[. . . . . ἀ]πολελύσθωι. ἐὰν δὲ μὴ ἀποδ[ῶ ὁ Νέαρχος]
[καθὼς πρόκειται μηδὲ] Ἀσκληπιάδης περιῆ, ἀποδότωσα[ν οἱ . . . . . κληρονόμοι]
[τὰ . . . . . κο]ντα τάλαντα τοῦ χαλκοῦ ἐν ἡμέραις ἑξή[κοντα. ἐὰν δὲ Νέ]αρχος
[τελευτήσῃ πρὶν ἀποδό]σθαι αὐτὴν τὴν φερνήν, μενέτωι ἐπ[. . . . . κ]αὶ κυ-
[ριεία τῆι δεῖνι τῶν ὑπαρχ]όντων πάντων ὧν ἐὰν ἀπολίπῃ [Νέαρχο]ς καθό-
[τι ἐὰν βούληται,] ἕως ἐὰν ἀποδῶσι αὐτῇ τὴν φερνὴ[ν οἱ κλη]ρονόμοι.
[ἐὰν δὲ μὴ ἀποδῶ]σιν ἐν ταῖς ἑξήκοντα ἡμέραις, ἔστωι τ[ὰ ὑπάρ]χοντα πάντα

Col. II

[καὶ ἃ ἐὰν ἀπολίπῃ Νέαρχ]ος ἀντὶ τῆς φερνῆς, ὧν καὶ κυριε[ύσει σὺν]
[Ζωσίωι? ὅντιν' ἐὰν τρόπον] αἱρῆται ἐν μηδενὶ εἰργομ[ένηι, ἐφ' ᾧ, οὗ μεμέρικεν]
[Νεάρχωι . . . . . ὁ] πατὴρ συνευδοκοῦντος [Ἀσκληπιάδου κλήρου]
[κατοικικοῦ, ἔσται τῆι π]ρογεγραμμένηι τοῦ Νεάρχου γυν[αικὶ σὺν Ζωσίωι?]
[τῶν μεμερισμένων ὑπὸ] τούτου τῶι Νεάρχωι ἀρουρῶν εἰκοσιπ[έντε]
[ἡ καρπεία ἢ πασῶν ἢ] οὗ ἐὰν αἱρῆται μέρους ἄνευ ἐκφορίο[υ καὶ βε]-
[βαιώσεως καὶ μετε]πιγραφ[ῆς καὶ] ὧν ἄλλων πάντων Νέαρχ[ος ἀπο-]
[λίπῃ ἡ κυριεία], ἐφ' ᾧ [τελ]έσ[ουσι] τὰ εἰς τὸ βασιλικὸν καθή[κοντα]
[πάντα. τὰ δὲ ἐκφερό]μενα ταῖς δεκαπέντε ἀρούραις ἀποίσοντα[ι Νέαρ]-
[χος καὶ ἡ δεῖνα καὶ ἀποφερόντ]ωσαν εἰς τὸ ἴδιον Ζωσίωι τῶν τριῶν ἀρουρῶ[ν τὰ ἐκφερό]-
[μενα παραχρῆμα καὶ τῶν] ἀρουρῶν δέκα ἀπὸ τοῦ σπόρ[ου] τοῦ τετ[άρτου ἔτους]
[. . . . . πρ]ὸς ἀλλήλους συνοικεσίου συνγ[ραφ. . . . .]
[. . . . .]διαστ[αλῆι ἡ φερνή, ἄνευ ἐκφορίο[υ] καὶ βεβαι[ώ]σε[ως]

[. . . . .]ν καὶ Νεάρχωι τὰς δεκαπέντε ἀρούρας τὰ̣[ς προγε]-

[γραμμένας . . . . .]ε̣ι̣ς καρπείαν πάσηι βεβαιώσει. [ἐ]ὰν δὲ μὴ βεβαιο[ῖ]

[αὐτὰς καθὼς προγέγρ]α̣πται ἢ ἐπιχειρῆ ἀθετεῖν τι τ[ο]ύτων ἢ ἄλλο τι πα̣[ρα]-

[συνγραφεῖν . . . . .]νο̣ς περὶ ἓ̣α . . . τ̣ρόπωι ᾧτινιοῦν, ἡ μὲν συνγρ[αφὴ ἥδε]

[καὶ πάντα τὰ ἐν αὐτῆι] διωμολογημένα κύρια ἔστωι, ἡ δ[ὲ] ἔφοδ[ος ἄκυρος]

[ἔστωι αὐτῶι καὶ προσ]αποτεισ[ά]τωι Ἀσκληπιάδη[ς .]ν̣εανσ̣τ̣ ..[. . . . .]

[. . . . . μηδενὸς] ἐ̣π̣ενεχθησομένου περὶ [τ]ούτων ἐ̣[ν]κ̣λ̣ή-μα̣[τος],

[καὶ καθ' ἑκάστην ἔφοδον ἐ]π̣ί̣τ̣ιμον χαλκοῦ τάλαντα τριάκοντα καὶ ε̣ἰ̣[ς τὸ]

[βασιλικὸν τὰ ἴσα καὶ] μηθὲν ἧσσον. ἡ πρᾶξις ἔστωι Ζωσίωι καὶ [τ]οῖς [παρ']

[αὐτοῦ πᾶσιν κατὰ τ]ὴν συνγραφὴν καθάπερ ἐγ δ[ί]κης καθότι αὐτοῖς

[ἐκόντες πρὸς ἐκόντας συ]νεχώρησαν, ἡ δὲ ἡ γρα[φ]ὴ *sic* ἥδε κυρία ἔστωι.—

[γνωστὴρ πάντων τ]ῶν προγεγραμμέν[ων Θε]όφαντος Ἀνθαγόρου

['Ρόδιος τῶν] Ἀμμ[ων]ίου καὶ Νικοστράτου κ[ατοίκω]ν καὶ διάδοχος τοῦ

[π]ατρικοῦ κλήρου. [μάρ]τυρες· Ἡρόδοτος Καρδ[. . . .], Φιλώτας Πολέ[μω-]

νος, Κάλλιππος Φιλώτου, οἱ τρεῖς Θρᾷκες, Ἀντ[ιφῶν] Νικάνορος Ἀ[. . . .],

Ἀλέξανδρος Πτο[λεμ]αίου Μακεδών, Δοληδε . . s Ἀβλουζέλμ[ιος],

πάντες τῶν Ἀμμ[ω]νίου καὶ Νικοστράτου κατ[ο]ίκων ἱππέων.

Ἀντίγραφον ὑπ[ογρα]φῶν· Ἀμμώνιος ὁ παρὰ Ἡρακλείδου κεχρη(μάτικα)[L] . . . .[.

Νέαρχος Ἀ[σκληπιάδου] Μακεδὼν διάδοχος τῶν μεμερισμένων [ὑπὸ] τοῦ πα[τ]ρὸς ἀ[ρουρῶν εἰκ]οσιπέντε τέθειμαι τὴν τοῦ συνοικεσίου συνγρα[φὴν]

ταύτην [καὶ τὴν φερνὴν] ἢ [καὶ] τὰ τεσσαράκοντα πέντε τάλαντα [τοῦ]
χαλκοῦ κ[αταβαλῶ καθ]ὼς προγέγραπται.

Ἀσκληπιά[δης Ἀσκληπι]άδου Μακεδὼν τῶν Κόνωνος κατοίκων [ἱππέων]
συνευδοκῶ [τῆι γραφῆι] καὶ πᾶσι τοῖς κατὰ τὴν συνγραφὴν ταύτην [καθὼς]
προγέγραπται.

Ἀρτεμιδώρα Ἡρα[κλείδου σ]υνευδοκῶ τῆι συνγραφῆι καθὼς προγέγραπται. Ἀσκλη-
πιάδης Ἀσκλη[πιάδου γέγ]ραφα ὑπὲρ τῆς μη[τρ]ὸς συνταξάσης διὰ τὸ μὴ
ἐπίστασθαι γρ[άμματα].

Θεόφαντος Α[νθαγόρου] Ῥόδιος τῶν Ἀμμ[ωνίου καὶ] Νικοστράτου κατοίκων
ἱππέων ἐπι[γέγ]ρ[αμμαι γ]νωστὴρ τῶν προ[γεγραμμένων πάντων].

NOTES

3.]π̣α̣[.]ρ̣[. .], Schubart.

9–10. The restoration results from the fact that a plurality of persons is assumed as being the debtors. Therefore neither Nearchos nor Asclepiades can be referred to, and the reference to the latter's lifetime must be understood in a negative sense.

12f. ἐπ[ίβασις κ]αὶ κυ[ριεία?

12–17. As to the restoration, see pp. 111 ff.

17–24. As to the restoration, see pp. 113 ff.

18. πατήρ, Schubart.

25. On the left margin of the upper part of col. II, 17–20 letters are wanted in every line. Therefore the restoration given here is a little too large, and merely suggests the sense which seems to be demanded; see p. 116.

28. δ̣ι̣α̣σ̣τ̣α̣λη is very uncertain, Schubart.

32. ε̣α̣ . . ., Schubart.

34. [.]ν̣εανσ̣τ̣. .[, Schubart.

35. ἐ̣π̣ενεχθησομένου, Schubart.

40. Cf. 58. A γνωστήρ is also met with in two Oxyrhynchite marriage contracts of the second century A.D., *P. Oxy.* III 496 and *PSI.* V 450 recto col. I. In view of the analogy of our papyrus, I

believe that in *P. Giess.* 2 the Macedonian Apollonios is a γνωστήρ also. Further see *P. Sammelb.* v 7602.9 (ed. H. I. Bell, *Aegyptus* XIII [1933], 518 f.; Antinoupolis, A.D. 151): [γνωστῆρες τ]ρεῖς τοῦ τε γάμου. New evidence of the fact that the γνωστήρ has to attest the identity of the persons (see above all J. Partsch, *P. Freib.* II 38: *Sitz.-Ber. Heidelberger Ak.*, Heidelberg, Winter, 1916, X) is afforded by *P. Teb.* III 816, where we read twice: γνωστεύω Δημαίνετον—κληρονόμον τῆς μητρὸς αὐτοῦ Μυρτάλης—[τού]τωι καθήκει ἡ κληρονομία.

41, 45, 51. The corps of Ammonios and Nicostratos and of Conon are unknown thus far.

42. Καρδ[ῶνος?], suggested by C. B. Welles.

46 *in fine*. See addendum on page vi.

1. The document is a copy (line 46) of a συγγραφὴ συνοικισίου (line 48). Nearchos son of Asclepiades, a Macedonian and διάδοχος τῶν μεμερισμένων [ὑπὸ] τοῦ πα[τ]ρὸς ἀ[ρουρῶν εἰκ]οσιπέντε, contracts a marriage with a woman whose name has not been preserved, but who almost certainly is the daughter or ward of Zosios, who is repeatedly mentioned and is probably the contracting party on the other side. This does not conflict with the fact that rights are granted to the woman herself; this is a common feature of marriage contracts and occurs as early as *P. Eleph.* 1. On the part of Nearchos, Asclepiades son of Asclepiades, a Macedonian τῶν Κόνωνος κατοίκων [ἱππέων], and the latter's mother, Artemidora daughter of Heracleides, participate in the contract by giving their συνευδόκησις. For their relations with Nearchos see p. 115.

The contract was drafted in the form of a six-witness document, but it is at the same time an *agoranomos* deed; see the κεχρημάτικα annotation in line 46. In a similar manner a series of wills of the Ptolemaic period were drafted,[394] and at first sight it might appear that in our text also the strange mixture of forms is due to the circumstance that it deals with rules to be observed after the husband's death with regard to his estate. Nevertheless I should prefer another explanation. The way of drafting the list of the witnesses is different from that which is used in wills, inasmuch as in the latter

[394] See H. Kreller, *Erbrechtl. Untersuch.* (see note 26) 323.

every witness is given his *εἰκονισμός*, while here, as in regular six-witness contracts, only the names are enumerated. I believe the hybrid form of our contract is a consequence of its hybrid subject matter, since it is a contamination of a *συγγραφὴ συνοικισίου* and a homologia (lines 32 f.: *ἡ μὲν συνγ[ραφὴ ἥδε καὶ πάντα τὰ ἐν αὐτῇ] διωμολογημένα*; cf. *P. Teb.* III 815 *fr.* 4 recto col. I and *P. Teb.* I 104.[395] Since the *συγγραφὴ ὁμολογίας* was, in the time of *P. Berol.* 16121, a six-witness document registered by *anagraphe*, it was, as to the form, not very different from our text. The latter differs only in that the simple *anagraphe* has been replaced by full notarial documentation. Considering this, the lack of a *syngraphophylax* does not surprise us. Certainly our contract was not drafted as a double instrument, but it is not out of the question that the original from which our *ἀντίγραφον* was taken carried a brief rudimentary "inner script," as was usual in the later Ptolemaic period.

2. Lines 2–11 deal with the case of a dissolution of the marriage by death, and obviously they assume that there are no children. Lines 2–6 assume that Nearchos' wife dies first. This corresponds to line 7 where *πρότερος* refers, in my opinion, to the wife rather than to Asclepiades. If the marriage is dissolved by the death of either of the spouses, only a part of the dowry must be returned. Nearchos, if surviving, has to pay within sixty days from the date of demand a number of copper talents to Zosios, or to his heirs or assigns, and then he will have fulfilled his obligation. Unfortunately the record of the amount has not been preserved. I believe that it is the forty-five copper talents that Nearchos pledges himself to pay instead of the *φερνή*. The former are mentioned in his *hypographe*, line 49, though the space in the second lacuna of line 5 would not allow this number to be inserted without assuming abbreviations, which are otherwise uncommon in this papyrus. If Nearchos dies first, Asclepiades has to pay

[395] For the differences between *συγγραφὴ συνοικισίου* and *συγγραφὴ ὁμολογίας* see the first chapter.

the same (?) sum, and then will be free as to the rest, lines 7–9. Possibly the debt may be transferred to the heirs either of Nearchos, or of Asclepiades, or of both of them, lines 9–11.

It is true that, as to the last two provisions, lines 7–11, a series of unanswered questions remains. How will Zosios, or his daughter (ward), enforce the demand, if either Asclepiades or the heirs fail to pay? Does the indefinite phrasing of line 9 assume Nearchos' death, either during the marriage or after its dissolution by his wife's decease; or does it grant to the heirs (in this case, those of Asclepiades) a right to avert an execution, carried out against Nearchos, by paying a certain sum? If we understand the passage in the first way, which seems to me sounder, because otherwise we should expect the same provision to be made in favor of Asclepiades himself, from what time is the sixty-day period reckoned for the heirs? It appears useless to suggest anything, in view of the complete lack of evidence either in our papyrus or in other sources.

3. With line 11 a new section begins. The woman is assumed to be living and to be a creditor as to the dowry, line 14; and the remnants of lines 11–13 can only be understood if we assume that the obligation to return the dowry comes into existence before Nearchos' death, and then passes to his heirs. Therefore the passage apparently reverts to the case of divorce, thus taking up again a matter that certainly had been dealt with in the lost part of the contract. It agrees with this interpretation that line 12, in contrast with the previous section, considers "the dowry itself" as the object to be returned.[396] It is stipulated that, if Nearchos dies before having paid back the *pherne*, his heirs shall do it within sixty days. To secure her right, his former wife will be allowed to take possession of all the estate he may leave,[397] and if the period

[396] A similar distinction is made in *P. Oxy.* III 497.

[397] W. Schubart proposed to restore line 12 f. as follows: *μενέτωι ἐπ[ίμονος κ]αὶ κυ[ρία ἡ συνγραφή or ἡ πρᾶξις*. But his suggestion seems to me unacceptable because a right of execution would hardly be granted during the period of grace, while lines 15–17 make it sure that after the sixty days the woman will not have a *praxis* but definite ownership *ἀντὶ τῆς φερνῆς*.

of grace expires without payment, this possession will become a definite title.

Substantially the woman's right, as established by those provisions, is a mere mortgage on property; liability is confined to the estate exclusively, and the heirs have merely the right to redeem it within a period of sixty days, after which the property will be forfeited to the creditor.

With this we have to be content. In particular we are unable definitely to determine what relations existed between our clause and those forms of pledging that are known from the imperial epoch. Μενέτωι in line 12 reminds us of the *μένειν* provision, recently pointed out by A. B. Schwarz,[398] which is found in some documents coming from the Oxyrhynchite nome,[399] and whose legal effects are somewhat similar. But it should be noted that in our case the property is transferred under a resolutory condition rather, whereas the transfer provided in the Oxyrhynchite papyri is made under a suspensive condition.[400] On the other hand, our papyrus may perhaps be compared with *BGU.* III 970 (Mitteis, *Chrest.* 242; A.D. 177), lines 15 ff.: *ἐὰν γένηται μὴ εὐτονῆσαι αὐτὸν [ἀ]ποδοῦναί μοι τὴν προοῖκα, λαβεῖν με τὸ ὑπάρχον* κτλ., and in some ways *BGU.* IV. 1072 recto col. I (Mitteis, *Chrest.* 195; P. M. Meyer, *Jur. Pap.* no. 62; A.D. 125/9), lines 5 ff., also may be compared: *συγγραφὴν ἔθετο γυναικί—δι' ἧς ὑπαλλάσσει πρὸς τὴν ἑαυτῆς φερνὴν πάντα ὅσα ἔχει καὶ ὅσα ἄλλα ἐὰν ἐπικτήσηται.* In these texts the right which is granted to the woman in her husband's property is construed as a *hypallagma*; as to *BGU.* III 970, this is at least highly probable, considering the mentioning of *ἀντίρρησις* and *ἐνεχυρασία* (lines 25 f.).[401] The hypothesis seems to me possible that agreements of the kind in question were

[398] *Aegyptus* XVII (1937), 246 ff.

[399] *P. Oxy.* III 506 (Mitteis, *Chrest.* 248); *P. Oxy.* III 485 (Mitteis, *Chrest.* 246); *P. Oslo* II 40; *P. Studi italiani di filologia classica* XII (1935), 103 ff. (*P. Sammelb.* V 7817).

[400] Schwarz, *op. cit.* 253.

[401] Mitteis, introduction to *Chrest.* 242; A. B. Schwarz, *Hypothek und Hypallagma* (Leipzig, Teubner, 1911), 142.

given, in Roman times, the form of a *hypallagma* in order to simplify the procedure for enforcing them. This would have been the more possible as the practical differences between the former and the later form were not very great, since "hypallagized" property also devolved upon the creditor,[402] and this evidently without leaving to the debtor any right of obtaining the residue. The fact that no obligation of *βεβαίωσις* is stipulated in our document, though this is a characteristic of the *μένειν* provision [403] as well as of the *ὑποθήκη*,[404] might also fit in with our suggestion.

A definite answer is not obtainable, however. For that we should have to know in what manner the woman could realize her right of possession in case the successors resisted. We should also have to know the method of enforcement against the divorced Nearchos during his lifetime; this was presumably stated in the lost part of the papyrus.

4. Even more difficulties arise in connection with the next passage, which seems to be the most interesting part of the text. No sure reconstruction is obtainable. As a basis for further discussion, I shall give a hypothetical explanation, which I none the less believe to be backed by a good deal of probability.

As is seen from lines 20 and 22, a distinction is made between 25 *arourai* of cleruchic [405] land that belong in some way to Nearchos, and other property to be left by him. Professor Schubart, considering lines 18 and 19, proposed to explain this distinction by the assumption that Nearchos' father is to cede, after his son's death, a part of the land in which he had given him a right to gather the crops, to his daughter-in-law and

[402] Mitteis, *Grundzüge* 147; Schwarz, *Hypothek und Hypallagma* 100 ff. See *P. Flor.* 56 (Mitteis, *Chrest.* 241; P. M. Meyer, *Jur. Pap.* no. 49); *BGU.* VII 1573; *P. Ross. Georg.* II 39.

[403] *P. Oxy.* III 506.35 ff.

[404] The warranty was essential to the conception of the *hypotheke* in contrast with the *hypallagma*; see Mitteis, *Grundzüge* 145, 148; Schwarz, *Hypothek und Hypallagma* 55.

[405] See the *μετεπιγραφή* mentioned in line 22.

her father with the right to gather the crops, but without rent, warranty, or *μετεπιγραφή*. But Schubart's interpretation faces the objection that there is no indication by the father of this intention, since the subscription of an Asclepiades in lines 51 ff. cannot be interpreted in this way. A disposition like the one suggested is impossible through mere *συνευδόκησις*.[406] Furthermore, if Schubart's hypothesis were thus far accepted, we should have to refer lines 51 ff. at any rate to the *συνευδόκησις* mentioned in line 18 rather than to the father's disposition, and then there would be no subscription of the father, although one is urgently required. Finally, the right to dispose of the 25 *arourai* had already passed from the father to Nearchos, who is called a *διάδοχος*. It is true that this expression can indicate the *prospective* successor; and it was used with this precise meaning by Ptolemaic cleruchs (*BGU.* VIII 1738.12, 1739.7).[407] Nearchos, however, is not only a designated successor, but the *διάδοχος τῶν μεμερισμένων* [*ὑπὸ*] *τοῦ πα*[*τρ*]*ὸς ἀ*[*ρουρῶν εἰκ*]*οσιπέντε* (lines 47 f.), that is, the actual successor to these 25 *arourai*[408] in consequence of a parental division. The tech-

[406] For the legal meaning of *εὐδοκεῖν* cf. W. Kunkel, *Ztschr. Sav. St. Rom. Abt.* XLVIII (1928), 299; F. Wieacker, *ibid.* LI (1931), 408 ff.

[407] Cf. also Eurip. *Alc.* 655 ff.; Dittenberger, *Orientis graeci inscriptiones selectae*[2] (Leipzig, Teubner), 86.7 ff.; P. Oxy. I 54.5 ff.

[408] H. Kreller (in *Papyri und Altertumswissenschaft* [see note 110], 237 ff.) determines the *diadochos* as being the successor in the personal position of the defunct as head of the family (similar to the Roman *heres*), in contrast with the *kleronomos* who is a successor to property only. But this seems to me not entirely accurate. The *diadochos* was also considered by the Greeks as a transferee of property; cf. Eurip. *loc. cit.*: *διάδοχος δομῶν*; Isaeus 7.14: *διάδοχος τῆς οἰκίας*; Testament of Ptolemaios Neoteros of Cyrene (*ed.* G. Oliverio, *Documenti antichi dell' Africa italiana* I fasc. 1 [Bergamo, Ist. Ital. d' arti grafiche, 1932]), line 12: *διαδόχους ἀπολιπεῖν τῆς βασιλείας*, and many other instances, especially in the papyri. If I am right, the idea of a succession as to domestic headship, such as is supposed to have existed in the Roman law, is alien to the Greek law. The idea of *diadoche* seems to be that of possessing the estate, or again single pieces of real or personal property, with reference to the community, on the basis of the same legal title to possession as the predecessor had. This links the use of the word with regard to private succession with that with regard to succession in a benefit of hereditary priesthood or in an office. The *kleronomos* is not as

nical meaning of *μερίζειν* requires this interpretation. We shall not be wrong, therefore, in referring line 18 to the parental division mentioned in line 47. The land is Nearchos' own *kleros*, and Asclepiades son of Asclepiades, who consents to the contract, must be the brother—the same, apparently, who had consented, according to line 18, to the parental division—and not the father, of Nearchos.

Thus lines 17 ff. differentiate between the rights to be granted to the woman in Nearchos' *kleros*, on the one hand, and in his other estate, on the other; and the passage belongs to the provision which begins in line 11. In the latter estate only, which certainly is free property, will the wife get a full title. In the *kleros*, Nearchos merely concedes her a right to gather the crops without paying rent, and with no protection by warranty, nor any confirmation in the cleruchs' register. I am almost convinced that this difference was deliberate, since it harmonizes with what is known from other sources with regard to the rights that existed in cleruchic lands. For as we know, thanks to W. Kunkel,[409] in the first half of the first century B.C. alienation of a *kleros* through an official *metepigraphe* was still forbidden unless the alienation was both to another cleruch and in order to get means to pay fiscal debts.[410]

If our hypothesis is right, the papyrus allows even more inferences as to the legal status of cleruchs late in the period of the Ptolemies. As far as the *kleros* is concerned, we notice a very close property community of the family. Asclepiades,

strictly distinguished from the *diadochos* as Kreller, *op. cit.* 239, believes; the former is a special kind of the latter. Here I can give no more than these suggestions; they seem to me not to conflict, at least, with what is said by E. Rabel, *Ztschr. Sav. St. Rom. Abt.* L (1930), 299 and by L. Wenger in *Studi in onore di Salvatore Riccobono* (see note 40) I 533.

[409] *Ztschr. Sav. St. Rom. Abt.* XLVIII (1928), 288 ff.

[410] Our statement allows an approximate fixation of the date of *P. Berol.* 16121. It can hardly be later than *BGU.* VIII 1731 ff. (between 100 and 65 B.C.). Free alienability of the *kleros* for the purpose of getting money in order to return a dowry is attested as early as by *BGU.* VIII 1848 (B.C. 48/6).

unlike his brother, is not called *diadochos*, and we cannot give a definite answer to the question whether he got a share in his father's division. In *BGU.* VI 1285, which is, except for the mutilated *P. Petr.* I 18,[411] up to now the only will of a Ptolemaic cleruch that deals with the *kleros*, the farmer-soldier leaves his *kleros*, weapons, and *stathmoi*, that is, his cleruchic estate, to his elder son, whereas both younger son and wife will inherit other property. But *BGU.* IV 1185 col. I 12 ff. and II 16 ff. testify to the fact that an exclusive succession in the *kleros* by the first son was not obligatory;[412] and the use of μερίζειν, as well as the circumstance that Asclepiades presents himself as a *katoikos* (line 51), makes it at least likely that he was a joint holder. However this may be, at any rate the *kleros* seems to be considered as a family estate and as a unity in spite of the parental division that had occurred. The principle always observed in cases of disposition of property belonging to a joint family was not neglected here; and both Asclepiades and his mother gave their consent to the contract. Artemidora's participation (line 54) agrees with common principles of the Greek marriage property law. The father's non-participation, if he was still alive, does not surprise us, because, after distributing his estate among his sons or ceding it as a whole to Nearchos, he had retired.

5. Lines 24 ff. obviously refer to the period of the marriage itself. Similar, if not identical, provisions are found in *P. Oxy.* II 265.11 [413] and *CPR.* 24 (Mitteis, *Chrest.* 288), lines 35 ff. The fifteen *arourai*, which, as is shown by the article ταῖς, had already been dealt with in the lost part of the papyrus, are not cleruchic land, since in the first lacuna of line 29 there is not sufficient space for the restoration καὶ μετεπιγραφῆς in addition to what is to be expected before]ν καί. I think that they belong to the *pherne* of Nearchos' wife. Their identity,

[411] See Wilcken, *Grundzüge* 384[2]; Kreller, *Erbrechtl. Unters.* 7[4].

[412] For the law of cleruchic succession see P. M. Meyer, *Jur. Pap.* p. 189, with further quotations.

[413] Kreller, *Erbrechtl. Untersuch.* 230.

on the other hand, with the fifteen *arourai* mentioned in line 29, and also dealt with before, is excluded by the fact that the latter are warranted; see lines 28 and 30.

Line 34: I am unable to explain this obligation of Asclepiades. It might appear to be indicated that he had ceded the fifteen *arourai* last mentioned to Nearchos (line 29), but this would hardly fit in with the fact that it is Zosios to whom the *praxis* is conceded in line 37. Furthermore, how does this stipulation fit in with the mere *syneudokesis* that Asclepiades gives in his subscription?[414] Nor does the import of the *praxis* itself become clear. Is it directed against Asclepiades only, and does it merely refer to the last stipulations, or does it cover the whole contract?

Finally the strange fact should be noted that no κύριος of Artemidora is mentioned in lines 54 f.

[414] But see J. Partsch, *Griech. Bürgschaftsr.* I 154; M. San Nicolò, *Beiträge zur Rechtsgeschichte im Bereiche der keilschriftlichen Rechtsquellen* (Oslo, Aschehoug, 1931), 138.

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Words which do not at least partially appear in the preserved part of the papyrus are not listed. References to words which are not complete are put in brackets, unless the restoration is certain. The definite article is not listed.—Roman figures refer to the fragments of the papyrus, and arabic figures to lines.

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